

1 REPORTER'S RECORD

2 VOLUME 3 OF 5 VOLUMES

3 TRIAL COURT CAUSE NO. 1042204D
4 COURT OF CRIMINAL APPEALS CAUSE NUMBER WR-75828-02
TARRANT COUNTY WRIT NUMBER C-3-011020-1042204D

5 EX PARTE) IN THE CRIMINAL DISTRICT
6) COURT NUMBER THREE
7 PAUL DAVID STOREY) TARRANT COUNTY, TEXAS

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13 _____
HEARING (CONTINUED)
14 _____
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17 On the 12th day of October, 2017 the following
18 proceedings came on to be heard in the above-titled and
19 numbered cause before the Honorable Everett Young, Judge
20 Presiding, held in Fort Worth, Texas, reported by machine
21 shorthand utilizing computer-aided transcription.
22

23 Lisa G. Morton, CSR
24 Deputy Official Court Reporter
25 Criminal District Court Number Three
Tarrant County, Texas

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VOLUME 3

HEARING (CONTINUED)

September 12, 2017

				PAGE	VOL.
Proceedings Begin				5	3
Defense Witnesses	Direct	Cross	Voir Dire		Vol.
Larry M. Moore	5,58	32	66,67 70		3
Ashlea Deener	79	90			3
Mark Daniel	94,106	100,112			3
William "Bill" Ray	115				3
Tim Moore	128,144	138	149		3
Cory Session	152				3
Glenn R. Cherry	164,181	174			3
Judith Cherry	183,195	189			3
State's Witnesses	Direct	Cross	Voir Dire		Vol.
Leticia Martinez	197				3
Mollie Westfall	200	202			3
Jeffrey Cureton	205	206			3
Proceedings Adjourned				212	3
Reporter's Certificate				213	3

ALPHABETICAL INDEX OF WITNESSES

	Direct	Cross	Voir Dire	Vol.
Cherry, Glenn R.	164,181	174		3
Cherry, Judith	183,195	189		3
Cureton, Jeffrey	205	206		3
Daniel, Mark	94,106	100,112		3
Deener, Ashlea	79	90		3
Martinez, Leticia	197			3
Moore, Larry M.	5,58	32	66,67 70	3
Moore, Tim	128,144	138	149	3
Ray, William "Bill"	115			3
Session, Cory	152			3
Westfall, Mollee	200	202		3

P R O C E E D I N G S

(Open court, defendant present)

THE COURT: I believe everyone is present at this time. So both sides ready to continue on the record at this time?

MR. BRAGG: We are, Your Honor.

MR. WARE: Yes, Your Honor.

THE COURT: All right. Mr. Ware, then you may proceed and call your next witness.

MR. WARE: Yes, Your Honor. We'd call Larry Moore.

THE COURT: All right. Mr. Moore, you may step up.

I believe you were here yesterday and sworn in.

THE WITNESS: I was, Your Honor.

THE COURT: You may be seated and make yourself comfortable.

You may proceed.

MR. WARE: Thank you, Your Honor.

LARRY MICHAEL MOORE,
having been previously duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WARE:

Q. Would you state your name, please.

1 A. Larry Michael Moore.

2 Q. Mr. Moore, what do you do for a living?

3 A. I'm an attorney for the -- licensed by the State
4 of Texas, and I'm currently employed as chief of the
5 criminal division of the Tarrant County criminal district
6 attorney's office.

7 Q. And how long have you held that position?

8 A. This time since 2000-- January 1st, 2015. I
9 originally went to work for the DA's office in 1977. And
10 in 1984 I was made chief of the criminal division, and I
11 served in that capacity until I left the DA's office in
12 1986.

13 Q. So you've been licensed to practice law how
14 long?

15 A. This is my 40th year.

16 Q. And I guess for those 40 years or so, has all
17 your practice been criminal justice related either as an
18 assistant district attorney or as a criminal defense
19 lawyer?

20 A. Yes.

21 Q. Okay. Are you -- are you board certified?

22 A. Yes. I was originally board certified in 1982,
23 and I have been continuously recertified every five years
24 since.

25 Q. Now, originally when you were in the district

1 attorney's office, did you handle any death penalty cases?

2 A. Yes.

3 Q. How many death penalty cases do you think you
4 handled?

5 A. I reviewed every murder case that was filed with
6 the district attorney's office to make a recommendation as
7 to whether or not we would seek death. I personally
8 participated in three death penalty trials as a
9 prosecutor.

10 Q. Okay. That was the first time you were in the
11 district attorney's office?

12 A. Yes.

13 Q. And what about as a defense attorney, were you
14 involved in any death penalty cases as a defense attorney?

15 A. Yes.

16 Q. Okay. How many?

17 A. I have been involved as a defense lawyer, I
18 think, my memory is in 11 death penalty trials.

19 Q. And so you've given an affidavit in this case,
20 have you not?

21 A. That's correct.

22 Q. Okay. And it's part of the record. Is -- I
23 assume everything in it is true and correct?

24 A. I believe so.

25 Q. Okay. You were appointed to represent Paul

1 Storey?

2 A. Yes.

3 Q. In his -- in the State's prosecution of him
4 that -- I guess the prosecution began back in 1996; is
5 that correct? Excuse me, 2006.

6 A. Yes. I don't remember the date that I got
7 appointed. I know Bill Ray was appointed before I was.

8 Q. Okay. The -- the indictment was in -- was
9 January 12th of 2007. Do you remember whether you were
10 appointed pretty soon after the indictment or right
11 before?

12 A. All I recall is that Bill had been appointed for
13 several months, I think four or five months before I got
14 appointed.

15 Q. Okay. And -- and the -- it was your
16 understanding at the time that the State was seeking the
17 death penalty; is that correct?

18 A. Yes.

19 Q. Did -- did there come a time when the State
20 offered Mr. Storey a life sentence?

21 A. Yes, there did.

22 Q. Do you remember when that was?

23 A. I remember that it was shortly before or at the
24 time that we began voir dire. I can't remember how much
25 in advance of the individual voir dire they made the

1 offer. But I remember discussing that offer with
2 Mr. Storey repeatedly during the individual voir dire.

3 Q. Okay. Now, when they made the plea offer, of
4 course, you and Bill discussed it, did you not?

5 A. Yes.

6 Q. Did -- did the State indicate that part of the
7 reason they were offering the plea to life was because
8 that the Cherrys were opposed to the death -- Jonas
9 Cherry's parents were opposed to the death penalty?

10 A. I don't remember them ever telling me that.

11 Q. Well, that's my next question. Did they ever
12 tell you that at any time?

13 A. I don't recall them ever telling us that the
14 parents were opposed to the death penalty.

15 Q. Okay. I mean, did you and Bill ever discuss it?

16 A. No.

17 Q. Bill never told you that?

18 A. No.

19 We discussed it after it came up for --
20 when you let me know about it, I called Bill at that point
21 and we discussed it then.

22 Q. That was this year?

23 A. That was this year. Yeah, back at the time, no,
24 we never discussed anything about it.

25 Q. In fact, you were -- would it be fair to say

1 that you were shocked --

2 A. Yes.

3 Q. -- when you found -- I mean, not just surprised
4 but shocked?

5 A. Yeah, I was taken aback.

6 Q. Okay. And you said, well, you don't remember,
7 but the thing is, the truth is, something like this, had
8 they told you about it, you would have remembered,
9 correct?

10 A. This is not a minor matter. I would have
11 remembered.

12 Q. Okay. Just how serious is it?

13 A. You're dealing with his life. There is nothing
14 more serious.

15 Q. Okay. Well, let me -- let me ask you, had you
16 known that the -- that Jonas Cherry's parents were against
17 the death penalty in this case, what actions do you
18 believe you would have taken as a result of that
19 knowledge?

20 A. Well, first thing I would have done is tried to
21 convince them, the State to waive the death penalty and
22 proceed with -- as a waiver case.

23 Q. Okay.

24 A. I would have also attempted to contact the
25 Cherrys. And if I was unable to talk to them, which is my

1 recollection we were told that they didn't want to talk to
2 us, I would have subpoenaed them to testify in the trial.

3 Q. Possibly gone over Robert's head?

4 A. Yeah.

5 Q. And talked to Curry or Levy about it?

6 A. Yes. And I've done that before.

7 Q. Do you think this is something you and Bill
8 would have discussed at length?

9 A. Absolutely.

10 Q. Now, it was -- there was a co-defendant in this
11 case too; is that correct?

12 A. That's correct.

13 Q. Mark Porter?

14 A. That's right.

15 Q. Okay. And originally, he was going to go to
16 trial first; is that correct?

17 A. That's my memory. And I think that Tim Moore,
18 one of his lawyers, was tied up in another trial, so we
19 got bumped first.

20 Q. And he also turned down a life sentence. Is
21 that your understanding?

22 A. You know, that's my memory that he had turned
23 down a life sentence as well. That's the reason he was
24 going to go to trial first. I know that after Mr. Storey
25 was convicted and sentenced, they went back and a life

1 sentence was offered and he accepted it.

2 Q. But until then, until after Mr. Storey's trial,
3 the party line was they were pursuing the death penalty on
4 Mark Porter, correct?

5 A. That was my understanding, yes.

6 Q. Okay. And so do you know who Mark Porter's
7 attorneys were?

8 A. Mark Daniel and Tim Moore.

9 Q. And during the course of representing
10 Mr. Storey, did you have conversations with Mark Daniel
11 and Tim Moore about this case?

12 A. About common issues, yes.

13 Q. Okay. Before the trial?

14 A. Yes.

15 Q. As the investigations were proceeding and you
16 were having pretrial motions and such?

17 A. Yeah. We communicated and cooperated to the
18 degree that we could.

19 Q. You and Bill both?

20 A. My memory, yes.

21 Q. Now, they never indicated to you and as far as
22 you know never indicated to Bill that they had been made
23 aware that the Cherrys opposed the death penalty?

24 A. There was never any discussion with anybody that
25 I recall about the Cherrys having been opposed to the

1 death penalty until after all this came up.

2 Q. I mean, had you -- in all your experience, have
3 you ever had the experience of the State continuing to
4 pursue the death penalty in a case where the parents are
5 against -- the parents of the victim are against the death
6 penalty? Have you ever had that experience before?

7 A. I don't ever recall it happening.

8 Q. I mean, it's a pretty extraordinary situation;
9 would you agree?

10 A. It would be extraordinary to pursue the death
11 penalty in a case in which the victim's family opposed the
12 death penalty, yeah.

13 Q. I mean, extraordinary enough that you would
14 remember it, correct?

15 A. I would think so, yes.

16 Q. Extraordinary enough that you would be
17 discussing it with your co-counsel?

18 A. Yes.

19 Q. Extraordinary enough that you would be
20 discussing it with counsel for the co-defendant in which
21 they were also seeking the death penalty?

22 A. Yeah.

23 Q. Extraordinary enough that you'd probably be
24 talking all over the courthouse about it?

25 A. Maybe.

1 Q. I mean -- I mean, this whole situation has
2 gotten a lot of media coverage now that it's come out in
3 the open, has it not?

4 A. It's a very unique situation.

5 Q. So what other actions do you believe you would
6 have taken had you actually been aware, if someone had
7 made you aware as Christy Jack and Robert Foran have
8 testified to under oath, if someone had explicitly made
9 you aware that the -- that Jonas Cherry's parents were
10 against the death penalty, what actions do you think you
11 reasonably would have taken?

12 A. Well, like I said, I think without question we
13 would have attempted to get the State to waive, whether
14 that included talking to the prosecutors or talking to the
15 elected district attorney or whatever. And then we would
16 have attempted to contact the Cherrys and attempted to get
17 them available to come to court and testify in the
18 punishment phase of the trial, if we reached that, that
19 they were opposed to the death penalty in this case.

20 Q. What if -- what if, for example, you know, you
21 had -- well, let me ask you this. Do you think you would
22 have talked to the jurors about it in voir dire?

23 A. Absolutely.

24 Q. I'm sorry?

25 A. Absolutely.

1 Q. And y'all didn't talk to the jurors about it in
2 voir dire?

3 A. No.

4 Q. In fact, did y'all have conversations about this
5 with the prosecutors during jury selection?

6 A. Conversations about what?

7 Q. About the Cherry -- Mr. and Ms. -- Dr. and
8 Mr. Cherry, Jonas Cherry's parents being against the death
9 penalty?

10 A. Absolutely not. We never had conversations
11 about it because we didn't know about it.

12 Q. I mean, are you absolutely certain about that,
13 no conversations with the prosecutors about the Cherrys
14 being against the death penalty during voir dire?

15 A. I have absolutely no memory of that. It came as
16 a shock to me when I heard about it. That's the reason I
17 called Bill and asked him about it. In all the years that
18 I've done this, that is not something that I would have
19 overlooked. If I was so stupid to have been told that the
20 parents were against the death penalty and then to allow
21 Christy Jack to get up and argue something inconsistent
22 with that, I would have been incompetent as a matter of
23 law.

24 Q. So say, for example, you had -- you and Bill had
25 said, Judge, we want to call the Cherrys and have them --

1 by the way, y'all put on evidence from Paul Storey's
2 family asking the jury not to impose the death penalty,
3 correct?

4 A. That is absolutely correct.

5 Q. And Judge Berry allowed it, did she not?

6 A. After an attempt or two she allowed it, my
7 memory.

8 Q. Okay.

9 A. I think she sustained an objection or two, but
10 eventually we got -- we were allowed to ask those
11 questions.

12 Q. And Paul Storey's mother, Marilyn Shankle was
13 allowed to answer that question without objection. Is
14 that your memory?

15 A. I don't remember, but I remember she answered
16 the question.

17 Q. Okay. And so if you were to put on the Cherrys
18 say, just testify to that, that they were opposed to the
19 death penalty, and the prosecutors objected, said, Judge,
20 that's -- that's not admissible, Judge, I mean -- I mean,
21 we're going to argue it, but it's not admissible, Judge,
22 what would you have done?

23 A. Well --

24 MR. BRAGG: Objection, Your Honor. I think
25 we're speculating at this point.

1 THE COURT: Well, I'm going to overrule the
2 objection at this time and allow the testimony.

3 THE WITNESS: Obviously, you know, the
4 issue as to whether or not the judge would admit it would
5 be up to the judge. It would be my belief that it would
6 be admissible in answering the special issues,
7 particularly in light of the fact that I am aware now,
8 having seen the little video that the Cherrys did for the
9 clemency petition, that Dr. Cherry indicated that the
10 prospect of a death sentence was -- would visit even more
11 pain upon them.

12 I don't know how in the world when the
13 family of the parents of the deceased are willing to
14 testify that the imposition of a death sentence would
15 bring additional pain and suffering to them is not
16 admissible under the special issues.

17 Q. (BY MR. WARE) But say for whatever reason Judge
18 Berry would not let it in, would y'all have taken some
19 further action that we would see evidence of now?

20 A. Obviously, we would have made a record on it,
21 you know. As to whether or not we would have tried to
22 seek any immediate intercession by any type of
23 extraordinary writ or anything, I can't tell you. I'd
24 have to look at it a lot more under the circumstances to
25 kind of know what options I felt like might be available

1 at that time.

2 Q. But there would be a record outside the presence
3 of the jury perhaps of what their testimony would be?

4 A. Absolutely.

5 Q. And then at least there would be a record by
6 which the Court of Criminal Appeals or whomever could
7 decide, assuming hypothetically Judge Berry didn't let it
8 in, could decide whether she should have let it in?

9 A. Absolutely. That is a large part of what you do
10 as a defense lawyer in representing somebody in a capital
11 case is build a record for appellate review.

12 Q. But none of that happened?

13 A. Huh-uh.

14 Q. I'm sorry?

15 A. No.

16 Q. Okay. And the reason it didn't happen is
17 because it was not disclosed to you?

18 A. That's correct.

19 Q. Now, let's go to -- let's go to final argument.
20 Christy -- by the way, prior to final argument, did the
21 State ever come to you and say anything like, oh, by the
22 way, we know we told you the Cherrys were against the
23 death penalty, well, we just had a -- we just had a
24 conversation with Mr. Cherry and now they're for the death
25 penalty, so we're going to argue that, just so you know?

1 I mean, anything like that?

2 A. Absolutely not.

3 Q. Now, when Christy argued that it should go
4 without saying that Jonas Cherry's family and everyone who
5 loved him believed the death penalty is appropriate, did
6 you assume that that was true?

7 A. Absolutely.

8 Q. It was no secret during the trial that Dr. and
9 Mr. Cherry were out in the audience watching almost all of
10 the trial, correct?

11 A. That's correct.

12 Q. I mean, that's -- that's -- I mean, you know
13 that from being a criminal defense lawyer, being in the
14 prosecutors' office, etcetera, you want -- and Christy and
15 Robert presumably wanted the jury to know who the Cherrys
16 were, why they were there, that they were interested in
17 the case. And so they were there conspicuously in the
18 courtroom throughout the trial; is that correct?

19 A. As a prosecutor, I would have wanted them in the
20 courtroom were they not going to testify. However, that
21 would have been their individual decision if they wanted
22 to be there or not. I wouldn't have forced them to be
23 there against their will.

24 Q. Okay. But there are tactical advantages to have
25 them there on display for the jury, is there not?

1 A. Absolutely.

2 Q. And those tactical advantages to having them on
3 display were certainly not lost on Christy Jack and Robert
4 Foran, would you say?

5 A. I would assume not.

6 Q. Now, you recall Suman Cherry, the widow,
7 testifying in the case at punishment?

8 A. Yes, I do.

9 Q. And she did not testify that she was in favor of
10 the death penalty, correct?

11 A. I don't recall her testifying to that, no.

12 Q. Well, that would be objectionable, wouldn't it?

13 A. Yes, it would be for her to ask -- tell the jury
14 that she wanted them to return a death sentence would have
15 been objectionable.

16 Q. Maybe even reversible error?

17 A. Yes. It would depend on when it came in the
18 trial. If it had come at a time -- were she to have
19 testified after we had put on testimony wherein we asked
20 the jury to spare his life, the witnesses all testified to
21 that, it might have been viewed as invited. If she
22 testified before them, then I don't think it's admissible.

23 Q. Fair enough. So one of the things you might
24 have done or probably would have done had you known that
25 the Cherrys -- Jonas Cherry's parents were against the

1 death penalty is -- because she was -- you know now that
2 she was aware that they were against the death penalty,
3 correct?

4 A. I'm sorry?

5 Q. Do you know that Suman Cherry knew that Dr. and
6 Mr. Cherry were against the death penalty?

7 A. I don't know that. I assume that based on
8 everything that I've heard, but I don't know that as a
9 fact.

10 Q. Well, if you had been informed as Christy Jack
11 and Robert Foran have said again and again under oath,
12 clearly informed that the Cherrys were against the death
13 penalty, that's something y'all might have cross-examined
14 Suman Cherry about?

15 A. We would have tried to get that in front of the
16 jury in every way imaginable.

17 Q. Including the cross-examination of Suman Cherry?

18 A. Uh-huh.

19 Q. I'm sorry?

20 A. Yes. I would probably have asked her if she had
21 had conversations with the parents and whether or not, you
22 know, what their attitude was.

23 Q. Okay. So going back to the argument, you
24 remember the argument?

25 A. Yes.

1 Q. And is it fair to say an argument like that
2 stings pretty bad?

3 MR. BRAGG: Objection, Your Honor,
4 speculative.

5 THE COURT: I'm going to overrule the
6 objection.

7 THE WITNESS: Yes, I thought it was very
8 harmful.

9 Q. (BY MR. WARE) And you got to -- but you assumed
10 it was at least true?

11 A. Yes, I assumed. That's the reason I didn't
12 object. I assumed that it was true, and I assumed that
13 I'd invited it by the testimony that we put on.

14 Q. But your testimony -- but they -- of course,
15 another thing they could have done is they could have
16 moved to reopen and put on testimony?

17 A. Absolutely.

18 Q. And then argued whether that testimony was even
19 admissible, correct?

20 A. That's correct.

21 Q. And, of course, your testimony did come in; is
22 that correct?

23 A. That's correct.

24 Q. So evidently according to the judge your
25 testimony was perfectly fine, correct?

1 MR. BRAGG: Objection, speculative. As far
2 as what the judge actually believed and what was going
3 into the judge's mind.

4 THE COURT: Well, I guess there was a
5 ruling, so. Any response, Mr. Ware?

6 MR. WARE: Well, I guess the record speaks
7 for itself.

8 THE COURT: All right. You may ask your
9 next question.

10 MR. WARE: Okay. Thank you.

11 Q. (BY MR. WARE) Of course, I mean, is it fair to
12 say that may have been admissible once y'all put on your
13 case or may not have been admissible, but -- but Christy
14 just took care of that by not bothering to put on evidence
15 or attempt to put on evidence and just interjected that
16 fact in front of the jury?

17 MR. BRAGG: Objection, that's
18 argumentative.

19 THE COURT: I'm going to overrule that
20 objection.

21 Q. (BY MR. WARE) Is that a fair statement?

22 A. I think that that's a fair statement. It would
23 have completely changed the way we approached the
24 punishment phase had we known that, you know. I'm not
25 sure how and what we would have got from the defendant's

1 family in terms of their testimony because I would have
2 really wanted to emphasize the Cherrys' testimony about
3 their opposition to the death penalty. I think it would
4 have completely changed the entire punishment phase.

5 Q. Now, had you known when -- of course, at the
6 very least, this was outside the record when Christy
7 argued it?

8 A. Yes.

9 Q. And she has testified that she trains other
10 lawyers and that sort of thing. I mean, there's no
11 question this was outside the record, correct?

12 A. It was outside the record, it was improper, and
13 I should have objected to it. And I didn't do it because
14 I didn't want to get into a big long discussion about
15 whether or not it was invited by our testimony in the
16 presence of the jury.

17 Q. Well, and who knows. I mean, you assumed that
18 it was true that the Cherrys -- it never occurred to you
19 that that was a lie; is that correct?

20 A. That is correct.

21 Q. And the -- say the judge sustained the
22 objection, has the jury already heard it?

23 A. Oh, yeah.

24 Q. Say the judge instructed the jury to ignore it,
25 has the jury still already heard it?

1 A. Yeah, absolutely.

2 Q. To your knowledge, did the judge know that the
3 Cherrys were against the death penalty?

4 A. I don't think so. I don't think anybody knew.
5 There was never anything filed. There was never any
6 notice given regarding that. I just -- I don't think
7 anybody knew that.

8 Q. Okay.

9 A. Other than the prosecutors.

10 Q. So the judge probably assumed it was the truth
11 too?

12 MR. BRAGG: Objection, speculation.

13 THE COURT: Well, I'll sustain that one.

14 Q. (BY MR. WARE) Well, the judge never said
15 anything to you about the Cherrys being against the death
16 penalty?

17 A. No.

18 Q. So had you known that that wasn't true, that not
19 only was it outside the record, not only was it certainly
20 arguably inadmissible evidence, even if it had been
21 properly offered, if you had known that it wasn't even
22 true, would there -- is there any question in your mind
23 you would have objected at that point?

24 A. No.

25 Q. You would have?

1 A. Yes, absolutely. If we'd known it wasn't true,
2 we'd a thrown a walleyed fit. I mean, it would have been
3 a completely different transaction.

4 Q. You and Bill Ray both?

5 A. Absolutely.

6 Q. Now, another thing you could have done is at
7 that point, and the rules permit you to do this, is move
8 to reopen the evidence; is that correct?

9 A. Well, we could have done that or they could have
10 tried to do that to put on the evidence. I'd probably
11 wanted to go outside the presence of the jury at that
12 point and put Ms. Jack under oath on the stand and talk
13 about it.

14 Q. Okay. Well, you could have reopened the
15 evidence and put the Cherrys on?

16 A. Sure, if I'd known it.

17 Q. Now, y'all filed a motion for new trial in this
18 case. Do you recall that? Or Bill Ray did?

19 A. I think I recall we probably did, yeah.

20 Q. And in addition to everything else that you
21 would have done up to that point, is it highly likely that
22 that would have been an additional ground for new trial?

23 A. Had we --

24 Q. Assuming you hadn't gotten relief up to that
25 point?

1 A. Yes.

2 MR. WARE: May I approach, Your Honor?

3 THE COURT: You may.

4 Q. (BY MR. WARE) Mr. Moore, I'm going to show you
5 what's been admitted as Defendant's Exhibit Number 1. And
6 it is a -- well, can you state what that is.

7 A. Appears to be a motion that I filed back in 2007
8 in connection with Mr. Storey's case, which is basically a
9 motion to present -- to produce inconsistent or mitigating
10 evidence.

11 Q. Okay. And the -- there's an order attached to
12 that that shows it's granted; is that correct?

13 A. Yes.

14 Q. Dated February the 8th of 2008?

15 A. That's what it appears, yes.

16 Q. Signed by Elizabeth Berry, Judge?

17 A. Uh-huh.

18 Q. There's also a transcript of the hearing on
19 that, which is Exhibit 2, that shows -- well, that also
20 shows that the motion was granted?

21 A. Yes.

22 Q. Now, let's look at the motion. Paragraph two.
23 And it talks about what the motion is requesting and says,
24 among other things, or any other evidence that would be of
25 material importance to the Defense even though it may not

1 be offered as testimony or exhibits by the prosecution at
2 the trial of this case on the merits. And further, that
3 the Court order that the State continue to provide any
4 such evidence to the Defense as soon as any such evidence
5 might become known by the State. Did I read that
6 correctly?

7 A. Yes.

8 Q. Now, the Cherrys being -- Mr. -- Dr. and
9 Mr. Cherry being against the death penalty, does that
10 clearly fall within that request?

11 MR. BRAGG: Objection, Your Honor, calls
12 for a legal conclusion.

13 MR. WARE: Well, Christy Jack has already
14 admitted it did fall in that request.

15 THE COURT: I'm going to allow the
16 response.

17 THE WITNESS: I'm sorry.

18 THE COURT: Overruled. You may respond.

19 THE WITNESS: In my opinion, it does.

20 Q. (BY MR. WARE) Okay. And that should have been
21 disclosed as soon as -- as soon as possible, as soon as
22 practicable, right?

23 A. That's right.

24 Q. That motion was granted back on February the
25 8th of 2008?

1 A. I believe so.

2 Q. Let me show you the State's -- Defendant's
3 Exhibit Number 3, the State's First Amended Notice of
4 Brady Material, if you could look over that.

5 A. Okay.

6 Q. Is -- and that was filed when?

7 A. It appears that the certificate of service is
8 dated the 10th of July of 2008.

9 Q. Okay.

10 A. Filed on July the 10th.

11 Q. That's pretty soon before jury selection began;
12 is that correct?

13 A. Yes.

14 Q. Now, is there any mention on there at all about
15 the Cherrys' opposition to the death penalty?

16 A. No.

17 Q. You knew Bob Ford, did you not?

18 A. Yes.

19 Q. And he was the original state writ attorney on
20 this case?

21 A. That's correct.

22 Q. And Bob was a tenacious lawyer?

23 A. Yes.

24 Q. You're smiling because that's kind of an
25 understatement, isn't it?

1 A. It is. He was very aggressive.

2 Q. And certainly a very diligent lawyer?

3 A. Yeah.

4 Q. Did you endeavor to talk to -- did he endeavor
5 to talk to you about the case?

6 A. He talked to me not a lot. We visited about the
7 writ application. We didn't visit much about it after he
8 filed the writ application because he accused us of
9 ineffective assistance in about five instances.

10 Q. Well, I mean, that's Bob.

11 A. I would have expected him to do exactly that.

12 Q. Okay. And he, from all appearances, went about
13 diligently investigating and litigating his state writ?

14 A. Yeah. He was the -- he was the one that
15 requested and got my trial file after the -- once he was
16 appointed.

17 Q. If -- and certainly, if you had known that the
18 Cherrys, at any point, that the Cherrys opposed the death
19 penalty, you would have related that to Bob Ford?

20 A. Yes.

21 Q. I mean, that's maybe one of the first things
22 that would have come to mind; is that correct?

23 A. It would not have been a secret at that point.

24 Q. And certainly knowing Bob like you do, there
25 would have been something in that state writ about that

1 fact?

2 A. I would --

3 MR. BRAGG: Objection, that's speculative.

4 MR. WARE: Well, it wouldn't surprise you.

5 MR. BRAGG: Again, Your Honor, that's
6 speculative.

7 THE COURT: Well, you're reforming your
8 question.

9 Q. (BY MR. WARE) Well, you know there was nothing
10 in that writ about -- that concerned that fact?

11 A. No, I recall that there was nothing in it about
12 that.

13 Q. In your opinion, knowing Bob like you know him
14 and knowing how critically important a fact like that
15 would be in a death penalty case, particularly since it
16 wasn't disclosed to you and Bill, in your opinion, is that
17 something that should have been raised in a writ had it
18 been known?

19 MR. BRAGG: Objection, speculative and
20 argumentative.

21 THE COURT: I'm going to overrule that
22 particular objection.

23 THE WITNESS: I'm sorry. What was the
24 Court's ruling?

25 THE COURT: Overrule the objection.

1 THE WITNESS: I have no doubt that I would
2 have been telling Bob Ford, he wouldn't have had to ask me
3 about it because I would have been telling him, that is
4 the first and foremost thing that you need to put in this
5 writ to bring forward to the Court of Criminal Appeals
6 because it's absolutely atrocious.

7 MR. WARE: I'll pass the witness.

8 THE COURT: State may cross-examine the
9 witness at this time.

10 CROSS-EXAMINATION

11 BY MR. BRAGG:

12 Q. Good morning, Mr. Moore.

13 A. Good morning.

14 Q. You said on direct there that it would be
15 extraordinary where the defendant's family was against the
16 death penalty?

17 A. I think I indicated it would have been
18 extraordinary for the State to be pursuing a death
19 sentence in a case where the family was opposed to it.

20 Q. But you do recall the testimony of Suman, Jonas'
21 widow, correct?

22 A. Uh-huh.

23 Q. And are you aware now that Suman is for the
24 death penalty?

25 MR. WARE: Your Honor, that's -- that's

1 hearsay at this point.

2 MR. BRAGG: Your Honor, I'm pretty sure he
3 asked the exact same question.

4 MR. WARE: It's a fact not in evidence.

5 MR. BRAGG: Again, Your Honor, he asked
6 about Suman's opinion and he also asked if Suman knew
7 about the Cherrys' opinion. He asked that question on
8 direct.

9 MR. WARE: Well, I mean, if he knows,
10 that's different.

11 THE COURT: I'm not sure he asked it
12 exactly that way. I'll allow the response if he knows.

13 THE WITNESS: I don't know what her opinion
14 is about the death penalty. I've been told that she
15 supports the death penalty in this case, but I don't know
16 that to be a fact.

17 Q. (BY MR. BRAGG) Fair enough. What do you recall
18 of her testimony?

19 A. I don't recall a lot of her testimony. I think
20 it was very emotional. I think she suffered a great loss
21 and it hurt her deeply.

22 Q. Do you recall, in your opinion if you can
23 recall, do you recall it being powerful, just as you were
24 listening to it, looking around the courtroom, in your
25 opinion, is it a powerful testimony?

1 A. That is always powerful testimony.

2 Q. Now, you said that Bill Ray was appointed
3 several months before you were?

4 A. Yes, that's correct.

5 Q. So he was the first chair in the case?

6 A. Yes. To the degree that you have a first chair
7 in a death penalty case.

8 Q. Well, sure. But that distinction is an
9 important distinction?

10 A. I'm not sure it is, in all honesty. In a death
11 penalty case, it's all hands on deck and everybody does as
12 much as they possibly can.

13 Q. Have you ever had a situation where either you
14 were the first -- have you ever had a situation,
15 regardless of which chair you were, where the first chair
16 and second chair might have disagreed about how to pursue
17 a certain subject matter?

18 A. No.

19 Q. You've never had a single disagreement?

20 A. We may have at first blush, there may have been
21 some difference of opinion on how to proceed. But it was
22 all -- in every case I have ever tried, we've always
23 reached a joint decision, because I don't think that you
24 can proceed otherwise.

25 If you have one lawyer in the case that

1 feels strongly one way and another lawyer that feels
2 strongly the other way, I think you've automatically got a
3 conflict because each lawyer is required to use his best
4 judgment in the defense of their client and you don't
5 subjugate that just because the other lawyer doesn't feel
6 the same way. You've got to resolve that difference or
7 you can't go on.

8 You don't -- you don't get orders in a
9 death penalty case. First chair doesn't get to dictate
10 the strategy or the things that will be done. Each lawyer
11 has an individual responsibility to act in his own best
12 judgment for the defense of their client.

13 Q. You would certainly agree then, though, that
14 since it is all hands on deck and there obviously is a lot
15 of work to be done in a death penalty case, correct?

16 A. That's correct.

17 Q. From the beginning, correct?

18 A. Uh-huh.

19 Q. So you would agree that Bill Ray for those
20 several months when he was the first chair, that he was
21 working hard on the case?

22 A. That's my recollection.

23 Q. You said on direct that you -- well, let me just
24 ask you, because I'm not sure that I quite understood what
25 you said on direct.

1 When to your recollection was the offer of
2 life first made?

3 A. I don't -- I don't have a concrete recollection
4 of when it was made. I think it was fairly soon in
5 advance of the jury selection in the case, because I
6 remember that's when we were discussing it with Mr. Storey
7 and his family, is through the individual voir dire. So I
8 just don't believe it would have been made too far in
9 advance of that; otherwise, I think I'd recall us having
10 had those discussions before we actually were in voir
11 dire. Now, I know it continued throughout the voir dire.

12 Q. The life offer did?

13 A. Yeah. And actually, Christy had told me that
14 after we seated the jury, that they would accept a plea to
15 life if I could get him to take it.

16 Q. Did that seem odd to you?

17 A. Yes.

18 Q. Why?

19 A. Because I would not have -- in most instances if
20 you go so far as to seat the jury, at that point, you
21 know, you're in for a penny, in for a pound. So, yes, it
22 was unusual to me.

23 Q. Can you tell us about the conversations among
24 the trial team regarding the life offer?

25 A. Oh, other than the fact that we discussed it, I

1 think most of the time we talked to Paul together on
2 multiple occasions, and I talked to Paul by myself on
3 numerous occasions. I had several conversations with his
4 mother trying to get her to come down and help us visit
5 with Paul in order to get him to accept a life sentence.

6 So I don't recall that there was -- I don't
7 recall anything particular that we talked about between
8 Bill and I other than the fact we had this life offer and
9 we need to get Paul to take it if we could.

10 Q. Did y'all discuss the fact that it was odd that
11 it was on the table for so long?

12 A. I don't have any recollection of us talking
13 about that.

14 Q. When did you learn that Mark Porter also had a
15 life offer?

16 A. It wasn't -- he didn't -- I'm not sure if I
17 remembered -- I think I remember him rejecting the life
18 offer. It -- they were set to go to trial first. And,
19 you know, it was kind of a last-minute change that we got
20 bumped up because of a conflict in their trial schedules.

21 I'm not sure when I knew that they had
22 extended the life offer to Mark Porter. I don't even
23 recall when it is that I know -- knew that he'd rejected
24 it. I just recall that I knew that he had rejected it and
25 they were both going to go to trial with the State seeking

1 a death sentence.

2 Q. Okay. But you certainly were aware of the life
3 offer after Mr. Storey was convicted and after the
4 verdict?

5 A. After the verdict came, yes.

6 Q. And that was part of your motion for new trial,
7 wasn't it?

8 A. Yes.

9 Q. Did y'all discuss the life offer consistently
10 through voir dire with the prosecutors?

11 A. I remember having several occasions -- on
12 several occasions talking to Christy and telling her
13 Paul -- I was having great difficulty trying to convince
14 Paul to take it and that I -- I asked her if she would
15 leave the offer on the table while I continued to try to
16 talk to him in an attempt to get him to take the offer.

17 Q. Do you recall her saying that she, at some point
18 in your voir dire, that she said that she really hoped
19 that you could get him to take the life offer?

20 A. I don't specifically remember that. I would not
21 -- I could see her saying that. I just don't have a
22 specific recollection of her telling me that.

23 Q. You don't recall her saying that she lit a
24 candle for you and actually said a prayer that Mr. Storey
25 would take a life offer?

1 A. I don't recall that. She very well may have
2 said something like that. I know she was interested in
3 him taking the life offer.

4 Q. So you mentioned that you and Christy would
5 discuss these things. Would the prosecutors and defense
6 counsel discuss this matter interchangeably? For example,
7 might it be -- like, did you have conversations with
8 Robert about it or just with Christy?

9 A. I am sure that I had conversations with Robert
10 about it. I don't have as good of a recollection of them
11 as I do my conversations with Christy.

12 Q. Would Bill have conversations with Robert, I
13 mean that you were aware of?

14 A. Yes. I think Bill had conversations with both
15 of them.

16 Q. You mentioned that it was very odd that the
17 offer of life was on the table for as long as it was. Is
18 that part of the reason why you wanted to contact the
19 family members of Jonas Cherry?

20 A. No. I know for the -- I can't -- I cannot
21 recall if I tried to contact the family of the deceased in
22 every death penalty case that I had. I know that I did
23 not do it early on and I didn't do it in every case. I do
24 specifically remember in the last three death penalty
25 cases I tried we tried to contact the family and initiate

1 some kind of dialogue.

2 I remember specifically in the case that --
3 the one I tried before this was a guy named Andrew
4 Wamsley, the family refused to talk to us. My memory in
5 this one is that we attempted to contact them and the
6 prosecutor told us that the family didn't want to talk to
7 us. And the one I tried after this, the family actually
8 did visit with us.

9 Q. So then what was the motivation behind asking to
10 talk to the family in this case?

11 A. In most instances, we want to establish some
12 kind of a dialogue with them so that we can get their
13 feelings regarding the death penalty, get some idea of
14 what their testimony is going to be like, and see if
15 there's any way in the world that we could intrigue them
16 to the degree that they'd be willing to say that they
17 didn't want to pursue -- have the State pursue the death
18 penalty in the case.

19 Q. You've worked -- well, you mentioned that you
20 were a prosecutor before you were a defense attorney,
21 correct?

22 A. Uh-huh.

23 Q. And you went to be -- remind me again how long
24 were you a defense attorney?

25 A. I was a defense lawyer for about 30 years, from

1 1986 up until January 1st, 2015.

2 Q. Had you had cases against Robert Ford -- Robert
3 Foran?

4 A. I don't recall ever having tried Robert in
5 another case other than that one. I had cases where he
6 was the prosecutor on the other side, yes.

7 Q. But as far as trying a case, you recall this is
8 the only time you tried a case with --

9 A. This is the only one I think I ever tried.

10 Q. So these other cases, they pled out or
11 something, a similar disposition --

12 A. Yeah, they weren't death penalty cases, and all
13 of them were resolved by one manner or another other than
14 trial.

15 Q. Did you believe him to be honest in his dealings
16 with you?

17 A. I had no reason to think otherwise.

18 Q. Had you worked against -- or had you tried cases
19 against Christy before this one?

20 A. Yes.

21 Q. Or since this one?

22 A. I tried a death penalty case against Christy
23 before this one. Actually, the only two cases I ever
24 recall trying against Christy were death penalty cases.

25 Q. Did you have other cases that you worked with

1 her on where, again, it reached some other disposition, a
2 plea deal or dismissal, something like that?

3 A. I'm sure that I did.

4 Q. In those dealings, did you believe her to be
5 truthful?

6 A. At the time, yes, I did.

7 Q. Did you believe her to be forthright?

8 A. At the time I believed that to be the case.

9 Q. Okay. Going back to this case in particular,
10 was this a difficult punishment case or a mitigation case
11 for you to develop?

12 A. We -- yes. We had -- we attempted to develop
13 all the --

14 MR. WARE: Your Honor, I'm going to object
15 as to relevance at this point.

16 THE COURT: Any response?

17 MR. BRAGG: Well, I mean, I think, Your
18 Honor, the mitigation case, the State's punishment case,
19 all -- is going to go to the heart of the arguments that
20 we're making.

21 THE COURT: Well, I'm going to overrule the
22 objection at this time and permit the question and answer.

23 MR. BRAGG: Thank you, Your Honor.

24 THE WITNESS: We attempted to develop all
25 of the mitigating evidence that we could develop to

1 marshal into court for the purposes of the punishment
2 phase.

3 Q. (BY MR. BRAGG) Did you find it -- did you find
4 the nature of this case -- or the nature of the crime, the
5 nature of the murder, did you find that difficult to argue
6 against as far as --

7 MR. WARE: Again, I object to the
8 relevance.

9 THE COURT: I'm going to overrule the
10 objection at this time.

11 THE WITNESS: I'm sorry, I don't understand
12 the question. Would you repeat it?

13 Q. (BY MR. BRAGG) I apologize. Let me see if I can
14 do a better job.

15 You would agree that the nature of the
16 offense itself was a strong case for death, wasn't it?

17 A. It was a very, very difficult case, yes.

18 Q. So by difficult case you mean?

19 A. Yeah, I think it was a strong -- there was a
20 strong punishment element in the case that I was concerned
21 about.

22 Q. Did you also consider it a problem that
23 Mr. Storey hadn't shown any remorse for the crime?

24 MR. WARE: Once again, I'm going to object
25 to relevance and to relitigating the case itself.

1 THE COURT: I'm going to sustain that
2 particular objection.

3 MR. WARE: Thank you.

4 Q. (BY MR. BRAGG) I would ask, is it true that the
5 State did not seek to introduce all the extraneous
6 offenses for which they'd given you notice?

7 A. That's correct.

8 Q. So you've testified that you -- well, you used
9 the words you don't remember, but you've also testified
10 that you do believe that you were not told that Glenn and
11 Judy, the parents of Jonas Cherry were against the death
12 penalty?

13 A. I don't recall ever being told. If I had been
14 told, my actions in this case would have been 180 degrees
15 different.

16 Q. You testified that you would have objected to
17 the closing argument had you known?

18 A. Absolutely endlessly, and I would have done
19 anything and everything to try to get it before the jury.

20 Q. Okay. And you believe that you would have been
21 found ineffective -- that you would have actually been
22 found to be ineffective counsel had you not done so?

23 A. Yes. And I don't think that any lawyer in the
24 world, if they knew that her argument was untrue and sat
25 there and didn't object, could be found anything other

1 than ineffective. There's absolutely no legal
2 justification.

3 Q. But you already knew that her argument was
4 untrue?

5 A. No, I didn't.

6 Q. Well -- so let's talk about the statement she
7 actually made. She said that, and it should go without
8 saying that all of Jonas' family and everyone who loved
9 him believed the death penalty was appropriate.

10 A. Uh-huh.

11 Q. You did not hear testimony from all of Jonas'
12 family, did you?

13 A. No.

14 Q. You did not hear testimony from everyone who
15 loved him?

16 A. No.

17 Q. Do you believe that she had talked to everyone
18 who loved him?

19 A. I don't have any idea.

20 Q. So at least in your mind you did not know
21 whether or not that was true?

22 A. I did -- I don't think I -- I don't know if
23 that's true or not. Didn't know at the time if it was
24 true or not. I don't think I ever thought about that. I
25 might -- my thinking when she made that argument was she

1 was referring to the immediate family, his wife and his
2 parents.

3 Q. Let me ask you, are you familiar with the case
4 Booth V Maryland, a Supreme Court case from 1987?

5 A. I've read it in the past.

6 Q. Are you familiar with a Supreme Court case from
7 1991, Payne V Tennessee?

8 A. I've read it in the past.

9 Q. And the Supreme -- excuse me. The CCA case from
10 2003, Simpson V State?

11 A. I know that I've read it. I can't remember it.

12 Q. And what about the CCA case from 2007, Shore V
13 State?

14 A. I don't remember the name.

15 Q. So I'd like to go back to the statement itself.
16 You knew that you could have objected to it?

17 A. Yes.

18 Q. And you did not?

19 A. That's correct.

20 Q. And I believe you testified on direct that it's
21 because you didn't want to have a long discussion in front
22 of the jury?

23 A. I thought that it was invited at that point.
24 And I felt like if I objected to it, that that's exactly
25 the response that I was going to get from the State. And

1 then we would be off into something that I didn't want to
2 reemphasize in front of the jury.

3 Q. Why not? I mean, why didn't you want to
4 reemphasize it in front of the jury?

5 A. Because I think that it hurts me. I don't want
6 to be talking about the fact that the whole family is
7 wanting the jury to give him the death penalty.

8 Q. Do you recall about how long -- well, let me ask
9 you about that real quick. I mean, do you think it's fair
10 to say that -- well, let me ask you, would you assume, at
11 the beginning of a death penalty case, would you assume
12 that the victim's family was against the death penalty?

13 A. Absolutely.

14 Q. Would you assume that -- not that necessarily
15 everyone that the defendant -- of the defendant's that
16 would -- the defendant would have some family that would
17 be for life without parole for sparing him or her?

18 A. The defendant's family?

19 Q. Yes. Sorry, let me rephrase.

20 Would you assume at the beginning that a
21 defendant's family members would be for sparing the
22 defendant's life?

23 A. In most instances, yes.

24 Q. So -- but you certainly knew at the time that
25 the statement that she made was outside the record?

1 A. Absolutely.

2 Q. So you knew that you could have objected?

3 A. Absolutely.

4 Q. You said you thought -- you thought you might
5 have invited error, but you also might not have and the
6 judge might have ruled in your favor?

7 A. If you're asking me should I have objected, yes,
8 it was a mistake. I had a reason why we didn't do it. In
9 retrospect, I should have done it, I should have objected
10 at the time.

11 Q. Sure. In retrospect, 20/20 is beneficial,
12 correct?

13 A. That's correct.

14 Q. You certainly know that being a defense
15 attorney?

16 A. Uh-huh.

17 Q. And even working for the State you know
18 hindsight is always best, right?

19 A. Sure.

20 Q. But at the time you certainly believed -- I
21 mean, you made a snap judgment. You believed that you had
22 a reasonable trial strategy for doing that, correct?

23 A. Yes.

24 Q. Do you recall about how long Christy's testimony
25 lasted -- or, excuse me, her closing argument lasted?

1 A. I don't remember. Probably 20 minutes,
2 something like that.

3 Q. Okay. Would you have any reason to doubt me if
4 I told you that her closing arguments lasted 15 pages?

5 A. No.

6 Q. Okay. Would you have any reason to doubt me if
7 I told you that the -- in total the State's closing
8 argument lasted 25 pages?

9 MR. WARE: I think this is all irrelevant,
10 Your Honor.

11 MR. BRAGG: Your Honor, at some point
12 you're going to have to answer a question of harm in this
13 case for all these claims if you do get past the
14 procedural bar, and there's a harm element to each claim
15 that they have raised.

16 THE COURT: I'm going to go ahead and allow
17 the testimony at this time. I'll overrule it.

18 THE WITNESS: I don't remember the
19 question, I'm sorry.

20 Q. (BY MR. BRAGG) I'm sorry. Would you have any
21 reason to doubt me that the State's closing arguments in
22 total lasted 25 pages?

23 A. No.

24 Q. So you testified earlier that you have been
25 told -- you don't know but you have been told at this

1 point that Suman was for the death penalty?

2 A. Yes.

3 Q. That being the same Suman that testified before
4 the jury. So it certainly was true -- at least as far as
5 you're aware, it certainly was true that some of his
6 family member (sic) and some of the people that loved him
7 were for -- would vote for death?

8 A. I don't --

9 MR. WARE: He doesn't know that, Your
10 Honor. That's crazy.

11 MR. BRAGG: Actually, just the way I
12 phrased it, Your Honor, he has been told this, so assuming
13 that to be true, then that -- this would also be true,
14 assuming A, then B.

15 THE COURT: I'm going to allow the response
16 if he can do that.

17 THE WITNESS: I'm not sure that I
18 understand the question. If what you're asking me is did
19 I know that Suman was in favor of the death penalty at the
20 time of the trial and at the time of the comment that
21 Christy made in final argument, I just assumed that. I
22 don't know that anybody ever told me that. She didn't
23 testify to it during her testimony.

24 Q. (BY MR. BRAGG) Of course.

25 A. So, you know, anything that I had in that regard

1 would have just been an assumption on my part because
2 nobody ever told me, well, the family is in favor of the
3 death penalty.

4 Q. So when Christy used the words all and everyone,
5 did that sound like puffery to you?

6 A. I don't have -- I don't know. I think that -- I
7 don't know. I don't know the answer to that question.

8 Q. That's fair.

9 Is it fair to say that you've been in
10 closing arguments before, either as a defense attorney or
11 a prosecutor, where the other side makes a statement, the
12 statement is here and gone, and the length of their entire
13 -- the length of their entire closing argument, the
14 statement's here and gone, do you think, that statement
15 was objectionable, but, as you said here, I don't want to
16 draw the jury's attention to it, I'll let that one slide?

17 A. Yes.

18 Q. And that's indeed, as a defense attorney, that's
19 a reasonable trial strategy, isn't it?

20 A. I think so. I think that's kind of the decision
21 that defense lawyers have to make all the time.

22 Q. Because there are certainly -- I mean, yeah, you
23 just said that they have to make it all time, right?

24 A. Yeah.

25 Q. Because sometimes you can do more damage to your

1 case by drawing the jury's attention to a statement as
2 opposed to just letting it slide?

3 A. You just reemphasize it.

4 Q. Sometimes these statements, they just fly right
5 by, and they're here and they're gone, and no one even
6 remembers that they were there?

7 A. In some instances. I don't think that's the
8 case here. I think this was a devastating statement.

9 Q. This one --

10 A. It impacted the entire way that I did my
11 argument. I had to completely change my argument because
12 her argument to the jury was passionate, she cried, it was
13 emotional. And I -- when I got up to argue, my entire
14 purpose was to try to disarm that argument to the degree
15 that I could.

16 Q. Her argument in whole?

17 A. In whole.

18 Q. Yeah, her argument in total?

19 A. Uh-huh.

20 Q. All 15 pages of it?

21 A. That's correct.

22 Q. It was a very passionate argument?

23 A. Very much so.

24 Q. And, of course, you had elicited the testimony
25 from several of the witnesses that testified on

1 Mr. Storey's behalf that they -- that they would vote for
2 life?

3 A. Yes.

4 Q. And that was included in your argument?

5 A. Absolutely.

6 Q. I would like to ask you -- so we talked about
7 how objecting can reemphasize or -- can reemphasize a
8 potential problem. It's fair to say too that calling the
9 Cherrys could have also reemphasized the arguments by
10 Ms. Jack?

11 I'm talking about the arguments in total,
12 all 15 pages of her argument.

13 A. Now, what are you talking about? If I --

14 Q. Yeah, let me clarify a little bit. So the way
15 this would have played out, at least as far as you -- I
16 mean, you said you would do everything that you could have
17 to undo this statement, and you said that you would have
18 tried to reopen the case and put on the Cherrys and get
19 that information in front of the jury --

20 MR. WARE: Your Honor, I object. That is
21 only a part of what he said. He said if he'd known the
22 truth about the Cherrys' opposition, the whole proceedings
23 would have been different.

24 THE COURT: So what's the question?

25 MR. BRAGG: Well, I mean, Your Honor,

1 Mr. Ware did just say that that was a part of what he
2 said, that he would try and put this testimony on through
3 the Cherrys in front of the jury. So I want to ask a few
4 questions about that.

5 THE COURT: All right. I'm going to allow
6 the questions at this time.

7 MR. BRAGG: Thank you, Your Honor.

8 Q. (BY MR. BRAGG) So my question then is, do you
9 believe that putting on the Cherrys would then have
10 reemphasized the other portions of the closing arguments
11 by Christy?

12 A. I don't think there's any way that you could put
13 them on the stand and not have the jury get a firsthand
14 rendition of the loss that they suffered. But for them
15 to, in the face of all that pain that they had suffered as
16 a result of this crime, to then turn around and testify to
17 the jury that they didn't want them to return a death
18 sentence because that would cause them additional pain
19 would have been absolutely devastating testimony. It
20 would have changed the result of this trial, in my mind.

21 MR. BRAGG: Object to that last statement,
22 Your Honor, it's speculative. I mean, that ultimately
23 goes -- that's an ultimate legal conclusion that you're
24 going to have to make.

25 THE COURT: I understand. I'm going to

1 overrule the objection and allow the response.

2 Q. (BY MR. BRAGG) They certainly would have been
3 allowed to testify, though, testimony the jury had not
4 heard before about the loss of their son?

5 A. Absolutely.

6 Q. Their only son?

7 A. Absolutely.

8 Q. Their testimony would have echoed Suman's
9 powerful testimony as well?

10 A. Absolutely. And that's why I think that it
11 would be so powerful for them in the light of that pain
12 and suffering to turn around and testify --

13 MR. BRAGG: Objection, Your Honor, at this
14 point as being speculative.

15 THE COURT: I'm going --

16 MR. WARE: Your Honor, I ask that he be
17 allowed to answer.

18 THE COURT: I'm going to overrule the
19 objection.

20 THE WITNESS: In light of all that pain and
21 suffering, for them to then turn around and testify they
22 want them to spare this man, I don't think the jury would
23 -- I don't think that there would have been a minute's
24 hesitation for the jury to come back with a life sentence.

25 Q. (BY MR. BRAGG) Of course, their testimony would

1 be simply that they are generally opposed to the death
2 penalty?

3 A. I don't know what their testimony would be or
4 not be because I didn't know that. But I've been told
5 that they are against the death penalty and were against
6 the death penalty in this particular case.

7 Q. Well, you just said that you don't know what
8 their testimony would have been.

9 A. I anticipate it's going to be that if that's
10 what -- if that's what they've said.

11 Q. That they were opposed to the death penalty
12 before they ever met --

13 A. The only thing I know about what the Cherrys
14 have said in that regard is what I've heard from Mr. Ware
15 and what I saw on the tape that they did for the
16 commutation where they told the governor's office on that
17 tape that the execution of this man would cause them
18 additional pain and suffering.

19 Q. But you don't know if they'd actually said that
20 on the stand?

21 A. Well, I can assume that if they're saying it now
22 they would have said it then. It is not a minor matter.
23 They lost their only son. And it's not a minor matter for
24 them to get up there and say, spare this man's life. And
25 we ought to be giving some respect to that.

1 Q. And I do agree.

2 Now, would it be a minor matter then for
3 Suman to get up and reemphasize her loss and then counter
4 that statement by saying, you should give him the death
5 penalty?

6 A. I think that that would have been --

7 MR. WARE: Now we're really speculating.

8 MR. BRAGG: Your Honor, the speculation now
9 must go both ways.

10 THE COURT: I'm going to overrule the
11 objection and allow the response.

12 THE WITNESS: And if she got up and
13 testified to that, I think it would have been admissible.

14 Q. (BY MR. BRAGG) In light of --

15 A. In light of -- in response to their testimony, I
16 think it would have come in, yes.

17 Q. And to use your words, that would not be a minor
18 matter either?

19 A. No, I don't think so.

20 Q. I'm sorry, can you repeat that?

21 A. No, I don't think it would have been a minor
22 matter that Suman was asking them for the death penalty.
23 I think it would have been -- I don't think the jury goes
24 back and compares, well, she wants the death penalty and
25 the parents don't want the death penalty. I think they --

1 it's an emotional response that they have.

2 Q. It certainly might be. But Suman was the one
3 that had just married Jonas, correct?

4 A. Uh-huh.

5 Q. She was the one that was going to start a family
6 with him, correct?

7 A. That's correct.

8 Q. She was the one they were going to start -- they
9 were going to start a small business together?

10 A. That's my understanding.

11 Q. She was going to -- she was the one that was
12 planning out the rest of her life with him?

13 A. That's correct.

14 MR. BRAGG: Pass the witness, Your Honor.

15 THE COURT: Any other questions from the
16 Defense?

17 REDIRECT EXAMINATION

18 BY MR. WARE:

19 Q. Mr. Moore, in a death penalty case, in your
20 opinion, how important is it for the prosecutor who is
21 asking the jury to return a verdict of death to have
22 complete credibility with the jury?

23 A. I think it is one of the most important things.
24 You spend your entire voir dire and trial trying to
25 engender that kind of trust and support from the jury so

1 that they will believe you and listen to what you say when
2 you get up and ask them to return a death sentence.

3 Q. And certainly that's true of the defense lawyer
4 as well?

5 A. Absolutely.

6 Q. But in your opinion, even more important with
7 the prosecutor because the prosecutor is asking the jury,
8 basically, to kill the defendant, correct, and that's the
9 right thing to do?

10 A. Yes. And I think that it -- I think it's very
11 difficult for the jury to do something like that anyway.
12 And I think if they don't have some kind of faith and
13 trust in the prosecutor, they're not going to go there.

14 Q. And if you had been able to reopen the case
15 after Christy argued this lie to the jury and put the
16 Cherrys on and say, you know, this nice couple that's been
17 sitting there in full view of the jury throughout the
18 trial, put them on and say -- have them testify as you saw
19 them say in the video, that they in fact do not believe
20 the death penalty is appropriate and that, in fact,
21 evidently this prosecutor had just lied to them, what
22 effect do you think that would have had on the --

23 MR. BRAGG: Objection --

24 MR. WARE: -- jury?

25 MR. BRAGG: -- speculation. Now he's

1 asking specifically what was in the jury's minds.

2 MR. WARE: Well, we've gone all into this.

3 MR. BRAGG: We haven't gone into the jury,
4 Your Honor.

5 THE COURT: Well, I'm going to overrule the
6 objection and allow the response.

7 THE WITNESS: I think if the jury felt like
8 that Ms. Jack had purposely stated something that was
9 false, that they would have lost the jury.

10 Q. (BY MR. WARE) Now, the State asked you some
11 questions about Ms. Jack personally, correct?

12 A. That's correct.

13 Q. And I think your responses were something like,
14 well, at the time I thought it was true or that she was
15 reliable; is that correct?

16 A. That's correct.

17 Q. Have you had an opportunity to rethink that?

18 A. This entire affair has been very unsettling for
19 me. I have always felt like prosecutors have an
20 obligation to do what they're supposed to do and do it in
21 a fair and honest manner.

22 Because of this and because of some things
23 that have occurred in other trials with prosecutors on my
24 staff coming and telling me about things that she has done
25 and --

1 MR. BRAGG: Objection, Your Honor. Now
2 we're going outside the scope of this.

3 MR. WARE: They opened the door to this,
4 Your Honor.

5 MR. HAMPTON: It's a central issue, Judge,
6 a credibility decision you're going to have to make.
7 Christy Jack has testified. I don't know what else he's
8 going to say.

9 MR. BRAGG: To the degree that --

10 MR. HAMPTON: This is a first assistant of
11 the Tarrant County District Attorney's office.

12 THE COURT: I understand that. I'm going
13 to allow the testimony with what we have at hand. I think
14 going into other matters I'm going to sustain.

15 MR. BRAGG: Thank you, Your Honor.

16 Q. (BY MR. WARE) Larry, you want to finish your
17 answer?

18 MR. BRAGG: Your Honor, I believe you just
19 sustained the objection with regard to the other.

20 THE COURT: To the extent that I'm going to
21 allow it, he may respond.

22 THE WITNESS: Okay. I'm not sure that I --
23 my opinion is -- of Ms. Jack has changed considerably, not
24 just because what's occurred in this case but what I am
25 aware of in other cases.

1 MR. BRAGG: Objection, Your Honor. That
2 statement goes directly to what you just sustained.

3 THE COURT: All right. I'll sustain.

4 MR. WARE: Well, Your Honor, we're not
5 asking for the details of the other case, but at least
6 that much he should be able to testify.

7 MR. BRAGG: Then just ask -- the question
8 then is just the general opinion.

9 MR. HAMPTON: And his basis for his
10 opinion, that's what he was stating. There's no
11 extraneous bad acts.

12 THE COURT: All right. He's already stated
13 that his opinion has changed. I think -- that's what I've
14 heard.

15 Q. (BY MR. WARE) Okay. So, Mr. Moore, your opinion
16 has changed to what? From what to what?

17 A. I have -- I have concerns about her candor.

18 Q. As a professional?

19 A. Yes.

20 Q. And once again, in general, what's that based
21 on?

22 A. Well, in part based on this proceeding, what
23 happened in this particular case, and in part --

24 MR. BRAGG: Now, objection, Your Honor,
25 because we're getting back into --

1 THE COURT: All right. I think this is
2 like the third time. I know you're trying --

3 MR. WARE: Your Honor, I think that -- you
4 know, I mean, we would like to get into the nitty-gritty
5 of each one of these incidents. But at least we should be
6 able to get in general what his opinion is based on.

7 THE COURT: I think I've got his general
8 opinion. I don't think we need to --

9 MR. WARE: Well, I guess for the record we
10 ought to get at least what his general opinion is based
11 on.

12 MR. BRAGG: For what purpose then, Your
13 Honor?

14 MR. WARE: Well, because the Court of
15 Criminal Appeals is going to be looking at this too.

16 THE COURT: Well, I'm going to sustain the
17 part of the State's objection that had to do with that.

18 MR. WARE: Can we put it on the record?

19 MR. OTTOWAY: We can do an offer of proof
20 later, Your Honor.

21 THE COURT: If you want to do an offer of
22 proof at some point, that would be all right.

23 MR. WARE: Okay. We can do that, Your
24 Honor.

25 THE COURT: All right.

1 You may proceed further.

2 Q. (BY MR. WARE) Now -- now, even though, if you
3 recall, even though the parents, Mr. -- Dr. and Mr. Cherry
4 were not called as witnesses by the State, the State did
5 go to great pains to have Suman in her testimony tell
6 about them, who they were, that they'd been there for the
7 trial, basically so the jury -- confirming in the jury's
8 mind who they were, that they'd been there, and all about
9 them; is that correct?

10 A. That's correct.

11 Q. And so you said that it seemed odd to you that
12 maybe at the time, certainly in hindsight, that -- that
13 they kept the life offer open even after the jury was
14 seated; is that correct?

15 A. That's correct.

16 Q. Knowing what you know now, that the Cherrys
17 opposed the death penalty, does that make more sense to
18 you now?

19 A. Yes.

20 Q. Knowing what you know now about Christy Jack's
21 argument to the jury and the fact that it wasn't true, is
22 that consistent with other prosecutorial misconduct you
23 know she's committed?

24 MR. BRAGG: Objection, Your Honor. That's
25 exactly what we talked about earlier, what you sustained.

1 THE COURT: All right. I'm going to
2 sustain the objection at this time.

3 MR. WARE: I'll pass the witness.

4 THE COURT: Any other questions from the
5 State?

6 MR. BRAGG: Nothing further, Your Honor.

7 THE COURT: All right. Thank you,
8 Mr. Moore. You may step down.

9 MR. HAMPTON: Judge, while he's there, we'd
10 like to do the proffer.

11 THE COURT: All right. Why don't we take a
12 very short recess. It's 10:30, we've been going about an
13 hour and a half. We'll take a short recess.

14 (Recess)

15 (Open court, defendant present)

16 THE COURT: All right. Back on the record
17 at this time. We've had about a 12-minute break. So
18 y'all want to proceed with your offer of proof at this
19 time?

20 MR. HAMPTON: Yes, Judge.

21 MR. BRAGG: Your Honor, if I may, I'd like
22 to briefly voir dire Mr. Moore regarding what we're about
23 to get into.

24 THE COURT: Well, briefly, you may proceed.
25

1 VOIR DIRE EXAMINATION

2 BY MR. BRAGG:

3 Q. Just to clarify, Mr. Moore, you do understand
4 what we're about to get into for the offer of proof
5 purposes?

6 A. I understand.

7 Q. I'd like to ask, without going into the
8 particulars of any individual prior conduct of Ms. Jack,
9 how do you know about these -- this prior conduct?10 A. There was one -- something arose in
11 connection --12 Q. Again, without getting into any specific
13 details, I would like to know, are these prior bad acts
14 ones that you are personally involved in?15 A. One is, and then I've been told by other
16 prosecutors about others.17 MR. BRAGG: Then to the other ones, Your
18 Honor, we would object to it coming out. It's hearsay at
19 that point.20 THE COURT: I understand that, but there's
21 been an offer of proof that's been requested and I thought
22 agreed to. I'm going to allow this just for the record
23 for what it's worth.24 MR. HAMPTON: Thank you, Judge.
25

1 VOIR DIRE EXAMINATION

2 BY MR. HAMPTON:

3 Q. Earlier you gave an opinion about Christy Jack,
4 your latest opinion of her in light of her failure to
5 disclose the Cherrys' opposition to Mr. Storey's
6 execution. And you got some of that out. But can you
7 give the full basis of your opinion about Christy Jack?

8 A. I think what I told you was that as a result of
9 several things I have questions about her candor. And it
10 -- the very first death penalty case that I tried against
11 Christy Jack, after the fact, several months after the
12 trial concluded, she provided me with information that had
13 not been provided prior to that. I didn't think anything
14 about it. I forwarded it to the writ lawyer at the time,
15 and we went on down the road.

16 Since I have gone back to become a
17 prosecutor, there have been at least two cases that I know
18 of where the prosecutors who tried the case have come to
19 me as chief of the criminal division and told me about
20 instances where Ms. Jack has accused them of things that
21 were not true.

22 Q. I'm going to switch gears here and quiz you
23 about a different issue that's separate from the habeas
24 proceeding but is relevant to clemency.

25 MR. BRAGG: Your Honor, at this point we're

1 going beyond the offer of the proof.

2 MR. HAMPTON: Yeah, this is a different
3 offer of proof, actually, on a completely different -- as
4 I just stated.

5 (Counsel confer)

6 MR. HAMPTON: Yeah, it's the writ -- it's
7 the pending writ and my contention that we -- that an
8 unconflicted (sic) attorney pro tem would recommend to the
9 board relief for Mr. Storey.

10 MR. BRAGG: Your Honor --

11 MR. HAMPTON: And the reason -- the reason
12 that I'm urging that is it is an ongoing proceeding and
13 I'll never have another opportunity because of the
14 clemency process. In other words, imagine it's a year
15 from now and you have now set an execution date and he's a
16 week off from being executed. So where are we? We're
17 right back at the Board of Pardons and Paroles, and they
18 haven't heard from anybody from Tarrant County.

19 He's the first assistant now. The elected
20 district attorney, obviously, recused herself. But he
21 hasn't, and he can speak authoritatively as a prosecutor
22 to this case.

23 THE COURT: All right.

24 MR. BRAGG: If I may respond, Your Honor?

25 THE COURT: All right.

1 MR. BRAGG: At this point they've already
2 admitted we are clearly outside the bounds of the reason
3 why the CCA sent this case back. We're outside the scope
4 of this hearing. And to the degree that they want to make
5 this offer of proof, that's to a wholly different matter
6 that's before the CCA. No offer of proof should be
7 allowed here.

8 MR. HAMPTON: Well, the reason I'm doing it
9 like this is speed. I mean, we could go off the record,
10 have a different deal, come back another day. But he's
11 here, he's testified, it's all fresh, and it's the first
12 and maybe my only available opportunity to explore that
13 issue.

14 THE COURT: All right. Yesterday we had
15 this issue that was maybe relevant to clemency only where
16 the Court, I think, sustained an objection but then
17 allowed the answer for purposes of the record as it
18 related to the clemency. That was Ms. Jack's reiteration
19 that she would stand by her affidavit. So that happened
20 yesterday.

21 This is related to that, I guess. So I
22 guess in the same vein that I permitted responses
23 yesterday, I'm going to go ahead and permit that today.

24 I'm not sure that this is at all relevant
25 to the proceeding, the judicial proceeding we have in

1 front of us because -- concerning the writ. But since
2 we've gone this far, I'm going to allow questions of
3 Mr. Moore on that issue.

4 MR. BRAGG: And so if I can clarify this to
5 make sure that I'm on the right page, Your Honor. This is
6 simply an offer of proof. This is not part of the
7 testimony by Mr. Moore in this case?

8 THE COURT: Yes.

9 MR. HAMPTON: I'll stipulate to that,
10 that's not part of the testimony of this writ proceeding.

11 THE COURT: This is an offer of proof that
12 relates to the issue of clemency, which is a separate
13 matter from what we're actually doing. Since Mr. Moore is
14 here, I'm going to go ahead and allow it.

15 MR. HAMPTON: Thank you, Judge.

16 VOIR DIRE EXAMINATION

17 BY MR. HAMPTON:

18 Q. Mr. Moore, you're the first assistant of the
19 Tarrant County District Attorney's office?

20 A. I'm chief of the criminal division.

21 Q. Chief of the criminal division.

22 Imagine for a moment that you're the actual
23 elected DA of Tarrant County. What -- how do you think
24 this case should be disposed of in terms of clemency?

25 I mean, is this something that --

1 essentially I guess what I'm asking is, is this the kind
2 of case that a prosecutor would recommend to the Board of
3 Pardons and Paroles that the person be granted relief,
4 which is to say a commutation of a death sentence to a
5 life sentence?

6 MR. OTTOWAY: Your Honor, if they want to
7 talk about conflict, we have one right here in the sense
8 that he represented Mr. Storey at trial trying to save his
9 life. It's not simply that this is an individual who is
10 testifying on behalf of the district attorney, Your Honor.
11 This is almost categorically inadmissible.

12 MR. BRAGG: And just to add to that, he is
13 the very reason why the district attorney's office recused
14 themselves from this matter.

15 MR. OTTOWAY: This question shouldn't be
16 allowed.

17 MR. HAMPTON: I can respond to that, Judge.
18 The Board of Pardons and Paroles is in the
19 executive department. They're not getting -- they'll get
20 his testimony, but it doesn't affect them as like --
21 they're not judges. They're not even lawyers.

22 (Multiple simultaneous speakers)

23 THE COURT: One at a time.

24 MR. HAMPTON: It's an opinion that they're
25 going to know because they're going to be given everything

1 else. If he's able to say it, if he is -- if he feels
2 comfortable in saying it. He may very well -- I don't
3 know what his answer is. His answer may very well satisfy
4 the State. He may say I -- there's just no possible way I
5 can say that. But I want to get an answer from him one
6 way or the other.

7 THE COURT: All right. I agree with the
8 State. This is -- probably should not be allowed in this
9 proceeding, but we've been going all over the map.

10 MR. OTTOWAY: So you overrule our
11 objection, Your Honor?

12 THE COURT: I'm going to -- well, I think I
13 agree with you that it has nothing to do with the judicial
14 proceeding having to do with the writ.

15 MR. OTTOWAY: But if I may, with respect to
16 that, there is a pending matter where they're trying to
17 have us removed from this case. So to that extent, there
18 is a judicial matter that impinges upon clemency
19 proceedings. So this isn't wholly apart from clemency,
20 Your Honor.

21 MR. BRAGG: And that matter is before the
22 CCA, not this court.

23 MR. HAMPTON: That's the motion --
24 that's -- that's slightly different, which is they are
25 conflicted insofar as a matter is before the Board of

1 Pardons and Paroles. That's going to be decided by the
2 CCA as a matter of law one way or the other.

3 His address is not to the CCA. It is to --
4 in fact, frankly, depending upon what his answer is, you
5 can -- that can be -- this portion can be removed from the
6 record that goes to the CCA.

7 THE COURT: Well, it may be. I don't know
8 what's going to --

9 MR. HAMPTON: My sole interest here is
10 conveying to the Board of Pardons and Paroles about --

11 MR. OTTOWAY: And that could be done
12 through an affidavit, Your Honor.

13 MR. HAMPTON: -- when they -- when they
14 receive that package.

15 THE COURT: Well, why don't you do that in
16 an affidavit. I think that's a good point. I mean, why
17 does it have to be done right here right now?

18 MR. HAMPTON: Well, he's live, he's here,
19 and that's what we were doing. I thought we'd speed it up
20 with the affidavits this morning too. I mean, I'm good
21 either way. I just thought it's live, why not.

22 MR. OTTOWAY: I mean, if there's no
23 credibility determination for the Court to make on his
24 testimony, I don't know why it's testimony.

25 MR. HAMPTON: And I don't know why the

1 State of Texas is fighting so hard to keep this man from
2 giving an opinion about --

3 THE COURT: I agree. His opinion, his
4 answer is wholly irrelevant I think to what we have in
5 front of us. But since he's here, I'm going to go ahead
6 and allow it. I'll --

7 MR. HAMPTON: If you can -- if you can
8 answer.

9 THE COURT: I'll allow the response over
10 the objection of the State.

11 THE WITNESS: So what was the question?

12 Q. (BY MR. HAMPTON) The question is: You're well
13 versed in this case. You're currently in a supervisory
14 position in the Tarrant County District Attorney's office.
15 You've practiced in Tarrant County for a long time. The
16 Board of Pardons and Paroles is going to want to know what
17 justice is for Tarrant County if they end up having to
18 pass on the issue.

19 And I wanted to get your input to them
20 about what a fair disposition of this case is, namely, of
21 course, what we will be asking for is the board to commute
22 a sentence of death to life. And I wanted to get your
23 thoughts on that. And like I say, you're essentially
24 speaking really to seven members of the Board of Pardons
25 and Paroles when you answer.

1 MR. OTTOWAY: We'll continue our objection,
2 Your Honor.

3 THE COURT: I understand. I'm not sure why
4 it needs to be done in this fashion. You just
5 acknowledged that he's addressing the Board of Pardons and
6 Paroles. You know, I guess we've come this far, I'm going
7 to allow that response. But don't expect the Court to
8 take this into account. I recognize he was trial counsel
9 for Mr. Storey.

10 MR. HAMPTON: I'm not -- I'm just doing it,
11 this is convenient and --

12 THE COURT: Let's go ahead and get it out
13 of the way so we can go on to something else.

14 MR. HAMPTON: Definitely.

15 THE WITNESS: I can't speak on behalf of
16 the district attorney's office to that question. My
17 relationship with Paul, having been his defense lawyer, is
18 such we recused ourselves because of that relationship. I
19 just cannot speak on behalf of the district attorney's
20 office.

21 Q. (BY MR. HAMPTON) Okay. Can you speak as with
22 someone with a lot of prosecutorial experience?

23 MR. OTTOWAY: We'll continue our objection,
24 Your Honor.

25 THE COURT: I understand.

1 THE WITNESS: I would have great difficulty
2 as a prosecutor if I was not involved in this case with
3 the prospect that the parents of the decedent did not
4 support the death penalty and were telling us that the
5 death sentence would cause them additional pain. That
6 would cause me a great deal of concern, and I would not
7 want to subject them to additional pain.

8 Q. (BY MR. HAMPTON) Is that due to your oath to see
9 that justice is done?

10 MR. OTTOWAY: Your Honor, this is
11 ridiculous.

12 THE COURT: I'm agreeing at this point.
13 Just wrap it up and move on to the issues that we really
14 are here to resolve.

15 MR. HAMPTON: Can he answer that question?
16 That was pretty much it.

17 THE COURT: If that's it, go ahead.

18 MR. OTTOWAY: Your Honor, I again continue
19 our objections.

20 THE COURT: All right. I understand.

21 THE WITNESS: I think that it would be in
22 response to my obligations under that oath. But as just a
23 sentient human being, I wouldn't want to put them through
24 unneeded pain.

25 MR. HAMPTON: That's all I have, Judge.

1 THE COURT: Anything else while Mr. Moore
2 is here that we need to take up?

3 MR. BRAGG: No, Your Honor.

4 MR. WARE: No, Your Honor.

5 THE COURT: Is he done?

6 MR. BRAGG: Not from the State, Your Honor.

7 THE COURT: Thank you very much, Mr. Moore.

8 THE WITNESS: Am I finally excused?

9 THE COURT: Is there need for Mr. Moore
10 further?

11 (No response)

12 MR. WARE: Thank you, Mr. Moore.

13 (Witness leaves courtroom)

14 MR. WARE: Your Honor, we call Ashlea
15 Deener.

16 THE COURT: Is she out in the hallway?

17 MR. WARE: I believe she is.

18 THE COURT: Ashlea Deener.

19 MR. BRAGG: Your Honor, at this point,
20 while she's coming in, the State would lodge an objection
21 to hearing her testimony at this point at all. If her
22 testimony is going to mirror what was in her affidavit,
23 it's all hearsay. It's hearsay and it's double hearsay.

24 About the only thing that she can testify
25 to is what's already been testified to, that she was --

1 whether it's intern or extern, whatever the appropriate
2 terminology is, that she was on the case while she was
3 here at the Tarrant County DA's office as an intern and
4 that she was involved with conversations with the
5 prosecution, what both Robert and Christy testified to.
6 That's the only thing she can testify to.

7 THE COURT: Is there -- is it something
8 beyond the affidavit?

9 MR. WARE: Well, I mean, I think the
10 affidavit is the nuts and bolts of it. But it's certainly
11 conversations that she had with the prosecutors who have
12 already testified are very relevant to this case and that
13 they reflect the prosecutors' thought processes, reflects
14 what the prosecutors knew and when they knew it.

15 And it reflects that -- I mean, as the
16 affidavit itself says, she was not there at the punishment
17 arguments, but she was pretty much shocked and surprised
18 when she read, knowing what she did know, that -- in the
19 paper that Christy Jack argued like she did argue.

20 THE COURT: All right. Let me just say
21 this, as was pointed out previously. This is a live
22 hearing where both sides have an opportunity to develop a
23 record. I'm going to allow her to testify. And to the
24 extent that she needs to be cross-examined or examined --

25 MR. WARE: Thank you, Your Honor.

1 THE COURT: -- we'll do that in person. So
2 I'll overrule the objection.

3 (Witness enters courtroom)

4 THE COURT: And, Ms. Deener, you may step
5 up. I believe you were excused before we swore witnesses
6 in yesterday; is that right?

7 THE WITNESS: That's correct.

8 THE COURT: So you've not been sworn in?

9 THE WITNESS: Correct.

10 THE COURT: Raise your right hand.

11 (Witness sworn)

12 THE COURT: Thank you.

13 ASHLEA DEENER,
14 having been first duly sworn, testified as follows:

15 DIRECT EXAMINATION

16 BY MR. WARE:

17 Q. Would you state your name, please.

18 A. Ashlea Deener.

19 Q. And, Ms. Deener, what do you do for a living?

20 A. I'm assistant district attorney here at this
21 office.

22 Q. In Tarrant County?

23 A. In Tarrant County, the DA's office.

24 Q. Okay. And you're -- actually, you're in a trial
25 now and you took time out to come testify?

1 A. It actually pled yesterday, but I was supposed
2 to be, yes.

3 Q. Well, thank you for being here.

4 How long have you been an assistant
5 district attorney with the Tarrant County District
6 Attorney's office?

7 A. About six years.

8 Q. Okay. Did you get the job right out of law
9 school, pretty much?

10 A. I did.

11 Q. And before you became an assistant district
12 attorney here, were you an extern here or an intern,
13 whichever term is correct, for a while?

14 A. I was.

15 Q. Okay. And when was that?

16 A. I started my internship my first year of --
17 after law school, my first summer. So 2008, I believe, is
18 the first year I interned.

19 Q. And you're prosecuting felony cases, are you
20 not?

21 A. Yes, sir.

22 Q. So in 2008 when you were externing here, did you
23 -- were you included in the Paul Storey ex-- excuse me,
24 prosecution team?

25 A. I was, as an intern, yes.

1 Q. Okay. Can you describe that, when you became
2 involved and such?

3 A. I started my first internship when I was
4 assigned to the Criminal District Court No. 3, which at
5 the time was -- Christy Jack was the chief of that court,
6 so I was assigned to her court. And when I was assigned
7 to her court, I worked primarily with her. And she was
8 beginning the -- getting really prepared for the Paul
9 David Storey capital murder that was set to occur in the
10 fall of 2008.

11 Q. Okay. And did you participate in witness
12 meetings?

13 A. Yes.

14 Q. Or at least you were included in witness
15 meetings?

16 A. Yes.

17 Q. And part of it was to be a learning experience
18 for you, was it not?

19 A. It was.

20 Q. I mean, you didn't actually get paid or
21 anything?

22 A. I don't know if I got paid. I don't think my
23 first summer I did. In the fall 2008 I may have gotten
24 paid at that time. I can't remember. But it's paid as an
25 intern.

1 Q. I see. Okay. So you've given an affidavit in
2 this case?

3 A. Yes, sir.

4 Q. Is everything in there is true and correct?

5 A. Yes, sir.

6 Q. Okay. And so what's your first memory of being
7 involved in this case?

8 A. I remember them getting prepared on this case.

9 Q. By them you mean Robert Foran and Christy Jack?

10 A. That's correct. I remember that they had a
11 trial coming up, and it was the Paul David Storey capital
12 murder. I remember feeling very lucky to be able to work
13 on such a serious and interesting case. My main job as an
14 intern was to help organize everything in preparation for
15 trial.

16 Q. Okay. Do you remember being at a meeting with
17 Suman Cherry?

18 A. I do.

19 Q. And Suman Cherry was the widow; is that correct?

20 A. Jonas' wife, yes, at the time.

21 Q. And do you remember her -- do you remember when
22 that meeting was?

23 A. I don't. All I know is it was before trial.

24 Q. And do you remember her talking about how Jonas
25 Cherry's parents were opposed to the death penalty?

1 A. That's correct.

2 MR. BRAGG: Objection, Your Honor, this is
3 now double hearsay, asking what she heard Suman say about
4 the --

5 MR. WARE: Well, obviously, Your Honor, it
6 goes to -- as I said, it goes to what the prosecutors knew
7 and when they knew it.

8 MR. BRAGG: It can go to whatever, Your
9 Honor, it's still double hearsay.

10 MR. WARE: Well, it's not -- it's offered
11 for what was said and offered for state of mind of the
12 prosecutors.

13 MR. BRAGG: It's also offered for -- he's
14 offering it for the truth of what was said.

15 THE COURT: Are you offering it for the
16 truth of the matter or just to develop --

17 MR. WARE: Well, I mean, I guess they're
18 arguing at this point that the Cherrys really were for the
19 death penalty. I mean, I'm surprised that they're even --

20 MR. BRAGG: That's a side-bar, Your Honor.

21 THE COURT: All right.

22 MR. WARE: But the main thing, if this
23 court wants to take it for those limited purposes of what
24 the -- of what the prosecutors believed or were told at
25 the time, then that's fine.

1 THE COURT: I'm going to allow it for that
2 purpose. And again, this is both side's chance to develop
3 whatever record and, of course, the Court will have to
4 sort it all out later.

5 MR. WARE: Okay.

6 THE COURT: But for that limited purpose,
7 you may proceed.

8 Q. (BY MR. WARE) And what did she tell Robert Foran
9 and Christy Jack and you was the Cherrys', Jonas Cherry's
10 parents' views about the death penalty?

11 A. That they were opposed to the death penalty.

12 Q. Did that seem extraordinary to you?

13 A. Yes.

14 Q. Did you discuss that with them, the phenomena
15 with Christy Jack about the Cherrys being opposed to the
16 death penalty?

17 A. Yes.

18 Q. Okay. Because it seemed -- it did seem so
19 extraordinary?

20 A. It did.

21 Q. And unusual?

22 A. Yes.

23 Q. Okay. Do you remember when those discussions
24 took place?

25 A. I don't. I just remember they were before

1 trial.

2 Q. And did you ask them how they were going to deal
3 with that?

4 A. I did.

5 Q. Okay. And do you remember what their response
6 was?

7 A. I do not.

8 Q. Okay. You do know that they didn't call Jonas
9 Cherry's parents as witnesses at trial; is that correct?

10 A. That's correct.

11 Q. You're not aware -- did they ever say, well,
12 we're going to disclose that to the other side, or
13 anything like that?

14 A. If they did, I was not a part of those
15 conversations.

16 Q. Okay. To your knowledge, did they ever disclose
17 that to the Defense?

18 A. I don't know.

19 Q. To your knowledge?

20 A. To my knowledge --

21 MR. BRAGG: Objection, asked and answered,
22 Your Honor. She just said she doesn't know.

23 THE COURT: I believe that's the answer.
24 Is there another question?

25 Q. (BY MR. WARE) As the intern, you think it's

1 highly likely if they'd disclosed that to the Defense you
2 would have known about it?

3 MR. BRAGG: Objection, speculation. I
4 mean, she doesn't know what other interns knew. She
5 doesn't know -- I mean, highly likely in what sense?
6 That's --

7 THE COURT: Anything, Mr. Ware?

8 MR. WARE: No, just we'd ask that she be
9 allowed to answer the question.

10 THE COURT: I'm going to allow the
11 response.

12 THE WITNESS: Can you reask the question?

13 Q. (BY MR. WARE) As the intern working with them on
14 this case, if they had disclosed it to the other side, do
15 you think it's very possible or highly likely you would be
16 aware of that?

17 A. That's really hard to answer that question
18 because I don't know -- I don't know -- I wasn't part of
19 every conversation, so I really don't know.

20 Q. They never told you they were going to disclose
21 it?

22 A. They did not.

23 Q. Okay. But they did tell you they weren't going
24 to call the Cherrys as witnesses?

25 A. That's correct.

1 Q. Okay. Now, you were not there for the final
2 arguments?

3 A. I was not there for the final arguments in
4 punishment.

5 Q. Okay. Did you find out about what Christy Jack
6 argued for the first time when you read about it in the
7 paper this year?

8 A. That's correct.

9 Q. And the fact that the Cherrys -- well, you
10 immediately thought back to the case, right?

11 A. That's correct.

12 Q. And that you knew that the Cherrys were against
13 Paul Storey getting the death penalty, correct?

14 A. That was my understanding, yes.

15 Q. Okay. And so did it really surprise or even
16 shock you when you read it in the newspaper that Christy
17 Jack had argued the opposite?

18 A. Yes.

19 Q. And did you seek advice from your boss as to
20 what to do about that?

21 A. Yes.

22 Q. And that would have been from Sharen Wilson?

23 A. Yes.

24 Q. The elected DA?

25 A. Yes.

1 Q. And as a result you contacted me; is that
2 correct?

3 A. Yes, sir.

4 Q. And you gave this affidavit?

5 A. Yes, sir.

6 Q. And you wanted to be very fair about all this,
7 correct?

8 A. I have.

9 Q. And as a matter of fact, you wouldn't -- you
10 wouldn't even talk to me any further unless the State was
11 present, correct?

12 A. That's correct.

13 Q. Okay. Because you wanted to be very fair about
14 all of this?

15 A. I wanted to be honest and fair, yes.

16 Q. Have you had a bad experience with Christy Jack
17 that would reflect on her integrity?

18 MR. BRAGG: Objection, Your Honor. This
19 is, again, what we discussed with Mr. Moore. It's going
20 into specific instances of conduct that are not a part of
21 this hearing.

22 THE COURT: Mr. Ware, is it something
23 besides the issue that's at hand?

24 MR. HAMPTON: Well, may I respond to the --
25 the --

1 THE COURT: The legal argument?

2 MR. HAMPTON: The legal argument. He's
3 objecting under Rule 608(b). She hasn't been asked the
4 question that would trigger that particular -- that
5 question hasn't been asked yet. They're jumping ahead, I
6 think. I think they're anticipating.

7 THE COURT: They probably have a reason to.

8 MR. BRAGG: Well, Your Honor, he did just
9 ask her the question, have you had prior instances with
10 Ms. Jack. And this is exactly the line of questioning
11 that was attempted with Mr. Moore and this -- under our
12 objection, for the exact same purpose, this court
13 sustained that objection and we had to make the offer of
14 proof. So we would object here as well.

15 THE COURT: I'm going to go ahead and
16 sustain the objection at this time. And there may be an
17 offer of proof coming, I don't know. But let's proceed.
18 I'll sustain the objection.

19 Q. (BY MR. WARE) Do you have an opinion about her
20 credibility?

21 A. Yes, I do. I do.

22 Q. And what is that opinion?

23 A. It's not a favorable one.

24 MR. WARE: We'll pass the witness.

25 THE COURT: All right. The State may

1 cross-examine the witness.

2 CROSS-EXAMINATION

3 BY MR. BRAGG:

4 Q. I'm sorry, could you pronounce your last name
5 for me?

6 A. Sure. It's Deener.

7 Q. Deener. Okay. I wasn't sure if it was Deener
8 or Deener (pronouncing).

9 Good morning, Ms. Deener.

10 A. Good morning.

11 Q. Now, you -- you were not present for any
12 conversations between the prosecution and Mr. and Mrs.
13 Cherry, that being Glenn and Judy Cherry?

14 A. That's correct.

15 Q. The only conversations so far that you recall
16 involving Suman Cherry is the single conversation,
17 correct?

18 A. Yes.

19 Q. You weren't present for conversations with
20 opposing counsel, were you?

21 A. Not all of them I was not.

22 Q. Do you think you were present for most of them?

23 A. No, probably not, no.

24 Q. A few of them, some of them, but definitely not
25 most of them, fair?

1 A. Exactly. That's fair.

2 Q. Okay. You testified that this was a -- that
3 this issue stood out in your mind at the time that it came
4 up?

5 A. Reading the Star-Telegram you're talking about?

6 Q. Oh, I'm sorry. Going back to the actual
7 preparation for trial where you had the conversation --
8 where you were present for the conversation with Suman
9 Cherry, you -- when you learned what you learned, you said
10 that stood out in your mind?

11 A. It did.

12 Q. And it stood out in your mind that you
13 remembered asking Ms. Jack and Mr. Foran about it?

14 A. That's correct.

15 Q. But you do not remember what their response was?

16 A. I don't. I remember thinking, I don't know that
17 I would feel the same way if somebody had brutally
18 murdered my son. I thought that was pretty amazing. And
19 I remember asking them how do you handle that, but I don't
20 remember what they said. I don't remember how they were
21 going to handle it.

22 Q. So it stood out enough to remember that you
23 asked the question, but not enough to remember what the
24 question was?

25 A. Yes, because I always thought that was a pretty

1 incredible feeling that a family had.

2 Q. Now, you said that you weren't present for --
3 you testified you weren't present for the punishment --
4 the closing arguments in punishment. Were you present for
5 the punishment testimony?

6 A. No.

7 Q. Were you present for any of punishment?

8 A. I'm trying -- I'm trying to remember. I think I
9 was present when -- I know I wasn't able to be there for
10 argument. But I think I was present for -- when Paul
11 Storey's mom testified and his brother testified in
12 punishment. I think I was present for that.

13 Q. Okay. Were you present for any of the State's
14 case on punishment?

15 A. I can't remember. I don't want to say no
16 because I can't remember.

17 Q. You just can't remember if you were present for
18 any of the State's witnesses?

19 A. I can't remember. During that time, because
20 that was the fall, I had started back at school and so --
21 law school, and so I remember a lot of the punishment part
22 I missed because I had to be in class.

23 Q. Were you present for the guilt-innocence
24 portion?

25 A. Yes.

1 Q. For all of it? Most of it, I guess?

2 A. For most of it, yes.

3 Q. Of course, you may have been coming and going on
4 certain days?

5 A. Yes.

6 Q. Okay. And then just to clarify a couple of
7 questions that were asked there at the end.

8 You did speak with -- you did speak with
9 Sharen Wilson about giving the affidavit and testifying
10 here?

11 A. I spoke with her as far as that I needed to
12 reach out to contact someone regarding this information.
13 And she recommended that I do that as soon as I can.

14 Q. Okay. At that time were you aware that they --
15 the writ had not been filed at that time; is that correct?

16 A. I was not aware what stage any of this was at.

17 Q. Okay. So when you provided the affidavit that
18 you provided here -- or when you contacted Mr. Ware and
19 provided the affidavit, you just weren't aware of what
20 proceedings were happening, at what point they were
21 happening?

22 A. That's right.

23 MR. BRAGG: No further questions, Your
24 Honor.

25 THE COURT: Any other questions from the

1 Applicant?

2 MR. WARE: That's all we have, Your Honor.

3 Thank you, Ms. Deener.

4 THE COURT: Is there further need of
5 Ms. Deener from either side?

6 MR. BRAGG: No, Your Honor.

7 MR. WARE: No, Your Honor.

8 THE COURT: All right. Thank you. You may
9 go back to work.

10 THE WITNESS: Thank you.

11 (Witness leaves courtroom)

12 THE COURT: You may call your next witness.

13 MR. WARE: Call Mark Daniel.

14 (Witness enters courtroom)

15 THE COURT: I believe, Mr. Daniel, you were
16 here yesterday and sworn as a witness.

17 THE WITNESS: That's accurate, Judge.

18 THE COURT: Thank you. You may be seated.
19 You may proceed then.

20 MARK DANIEL,
21 having been previously duly sworn, testified as follows:

22 DIRECT EXAMINATION

23 BY MR. HAMPTON:

24 Q. State your name.

25 A. Mark Daniel.

1 Q. And you're a criminal defense lawyer?

2 A. Yes, sir.

3 Q. Where did you just come from?

4 A. Parker County.

5 Q. Okay. Glad you made it.

6 A. Thank you.

7 Q. How many years have you been practicing law?

8 A. Closing in on 37.

9 Q. And you're board certified in criminal law?

10 A. Yes, sir.

11 Q. You've tried death penalty cases?

12 A. Yes, sir.

13 Q. About how many would you estimate?

14 A. I think it's 12 to a verdict. I'm not positive.

15 I think that's the number.

16 Q. Would those -- are we talking to completion?

17 A. Yes, sir.

18 Q. Okay. And you were the lawyer for Mark Porter,
19 Mr. Storey's co-defendant?

20 A. Yes, sir.

21 Q. Back in 2007 and eight?

22 A. I was appointed in February of 2007 and
23 continued to represent him through September of 2008, if
24 my recollection's accurate.

25 Q. Okay. And Mr. Porter ended up pleading guilty.

1 Can you tell the Court about when that happened and why?

2 A. It happened September 23rd of 2008.

3 And you say why, that's a broad question.

4 But why was an assessment of the evidence as far as his
5 guilt in the case. There had been offers previously
6 during the course of my representation from February of
7 '07 through the summer of '08. And, frankly, Mr. Storey's
8 case seemed to take priority in scheduling and was tried
9 first.

10 And shortly after that, we either went to
11 see Mr. Porter or went to see Mr. Foran about trying to
12 resolve this case. And Mr. Porter had been observing
13 Mr. Storey's trial from a distance and felt that resolving
14 his case with a plea was in his best interest at that
15 time. It all happened very quickly after the Storey
16 verdict.

17 Q. What was the primary prosecutor that you
18 interfaced with?

19 A. The only prosecutor I had contact with from the
20 State, the Tarrant County District Attorney's office was
21 Robert Foran.

22 Q. And you know today that Glenn and Judith Cherry
23 were opposed to anyone being executed for their son's
24 murder?

25 A. I have heard that, yes, sir.

1 Q. Mr. Foran has testified that he timely disclosed
2 that fact to you.

3 A. To me?

4 Q. Yes.

5 A. Okay.

6 Q. And you would -- let me ask you first. Would
7 you consider the Cherrys' opposition to the execution of
8 your client and Mr. Storey to be evidence?

9 A. I would call it a significant fact. I'm not
10 certain about the evidentiary admissibility.

11 Q. I'm not asking admissibility. Just as a -- is
12 it, first and foremost, is it evidence, in your mind?

13 A. Yes, sir.

14 Q. Mr. Foran has testified that he timely disclosed
15 this evidence to you. How do you feel about that?

16 A. I find that very disappointing. I had a number
17 of conversations with Mr. Foran during the course of my
18 representation. I've known Mr. Foran 20, 25 years. I
19 always found him honorable in his dealings. I had respect
20 for him.

21 And, Judge, I don't have sufficient
22 vocabulary to tell you what a fabrication,
23 misrepresentation that would be. That never occurred.
24 That never, ever happened in the course of my
25 representation. That is such a huge fact. I use the word

1 "fabrication" and "misrepresentation." There's probably
2 another word for it I won't use.

3 Q. If you had known back then that the Cherrys were
4 opposed to the death penalty, what kind of actions would
5 you have undertaken?

6 A. Well, bear in mind I was representing
7 Mr. Porter, and Mr. Storey's case was first in order. I
8 know that's something that my co-counsel, whose name was
9 Tim Moore, and I would have had exhaustive discussions
10 about in a trial preparation. I said a few minutes ago
11 I'm not sure about the admissibility, but I think I would
12 have been finding creative ways to ensure that my jury
13 learned of that fact, that that case would not have ended
14 without the jury knowing that. How I would do it I'm not
15 sure.

16 Mr. Curry, who was our elected district
17 attorney at that time, served in the office 35, 36 years
18 until his death in 2009, always had a door available for
19 people to talk and confer with him about cases. I think I
20 would have been in his office seeing if he was aware of
21 that and what his thoughts were and that you have a set of
22 a victim's family that is categorically opposed to it.
23 Surely this can be resolved short of a death trial.

24 I know I would have talked to Mr. Moore and
25 Mr. Ray about it extensively. Frankly, it would have been

1 the buzz of this microcosm we call the Tarrant County
2 Criminal Justice Center.

3 Q. In other words, had you known that the Cherrys
4 were opposed to your client's execution and Mr. Storey's
5 execution, that -- you wouldn't have been keeping that a
6 secret, you would have been shouting from the courthouse,
7 fair to say?

8 A. Been doing quite a few things, including
9 advising my client of that circumstance.

10 Q. And that never happened because you never knew
11 it?

12 A. That was never discussed, never revealed, never
13 communicated in pleadings, never, not an utterance.

14 Q. The State -- do you know Bob Ford?

15 A. Very well, during his lifetime.

16 Q. During his lifetime. And he's been faulted for
17 failing to discover the Cherrys' opposition.

18 MR. BRAGG: Objection, Your Honor, that
19 part was argumentative.

20 MR. HAMPTON: I'm not arguing with him.
21 I'm stating what's in their pleading. That's in their
22 pleading.

23 THE COURT: Okay. Well, you may preface
24 your question. And go ahead and get to it.

25 Q. (BY MR. HAMPTON) Tell us a little bit about Bob

1 Ford's work ethic.

2 A. Bob Ford was a passionate lawyer. He was a
3 fearless advocate. Not only at the trial level but the
4 post-conviction work he did. He was thorough beyond
5 description. When you said the question was work ethic,
6 Bob probably worked too hard, in my estimation.

7 Q. So the key words, I guess, and I'll just ask
8 them straightforwardly, is he the kind of lawyer that
9 would have exercised due diligence as appointed to -- as
10 habeas counsel on a death penalty case?

11 A. Mr. Hampton, due diligence is kind of a baseline
12 standard, in my estimation. Bob Ford always performed far
13 and above what is considered to be due diligence. He went
14 far beyond what is considered to be due diligence in his
15 trial work and his appellate work, from my outside
16 observations.

17 MR. HAMPTON: I'll pass the witness.

18 THE COURT: The State may cross-examine the
19 witness.

20 MR. BRAGG: Thank you, Your Honor.

21 CROSS-EXAMINATION

22 BY MR. BRAGG:

23 Q. Have you spoken with the Cherrys, Mr. Daniel?

24 A. I have not.

25 Q. Did you speak with the Cherrys at the time of

1 the trial?

2 A. No, sir. Mr. Storey's trial?

3 Q. Yes, sir. Let me be a little more clear with my
4 question, I apologize about that. Did you speak with
5 Glenn and Judith Cherry at the time of Mr. Storey's trial?

6 A. No, sir.

7 Q. Did you speak with Suman Cherry at the time of
8 Mr. Storey's trial?

9 A. No, sir.

10 Q. Again, just to clarify my earlier question, you
11 haven't spoken with Glenn or Judy even today?

12 A. No, sir.

13 Q. I mean, even leading up to this hearing?

14 A. No, sir.

15 Q. You haven't spoken with Suman Cherry leading up
16 to this hearing?

17 A. No, sir.

18 Q. When did the State offer life, do you recall,
19 for Mr. Porter -- Mr. Porter?

20 A. I don't have the date. And I went through my
21 storage area for a file and ran out of energy trying to
22 find it. But it was actually twofold.

23 During the course of my representation,
24 there was a initial offer from Mr. Foran that was an offer
25 of life to murder, not capital murder, to murder that was

1 coupled with Mr. Porter testifying against Mr. Storey.
2 That would have been a requirement of that. Mr. Porter
3 rejected that offer. I don't have the date, but it was
4 obviously sometime after I came to the case in February.

5 Subsequent to that, there was an offer of
6 not coupled with testimony but simply an offer of life
7 without parole that was communicated to Mr. Porter, and he
8 also rejected that.

9 And then at some point in time,
10 Mr. Storey's case -- to this day I don't know how and why
11 it happened, but his case took precedence as far as
12 scheduling. And I think it was lawyers' schedules,
13 frankly, but I don't know that. But -- and then that
14 rejection of the last life without parole offer carried on
15 into the Storey trial or that timeframe. And it was just
16 after the verdict in the Storey trial that we
17 re-approached Mr. Porter.

18 Q. You just said lawyer scheduling regarding which
19 trial went first. Do you recall was that a scheduling
20 issue on you and Tim Moore's part or was that a scheduling
21 on the prosecutors' part, do you recall?

22 A. I think Mr. Moore had a -- had a couple of
23 obligations during the timeframe the Court had slotted.
24 And please don't hold me to that. It was a long time ago,
25 and it was very vague. I just remember we came out of the

1 lead dog seat.

2 Q. And just to clarify when you said Mr. Moore, you
3 meant Tim Moore?

4 A. I'm sorry, yes, sir.

5 Q. We have two Mr. Moores here and we're trying to
6 make sure the record's clear.

7 You said that there was -- the initial
8 offer was life to not capital murder, life -- I don't want
9 to say just murder, but life to murder without the capital
10 attachment, correct?

11 A. Yes, sir.

12 Q. Were you aware that the evidence showed, and
13 indeed eventually the evidence did show at Mr. Storey's
14 trial, evidence showed that Mr. Porter probably fired the
15 initial shot into the back of Jonas Cherry's head?

16 A. There was actually a dispute about that fact.
17 What we were confronted with was two different caliber
18 projectiles found at the scene. And with statements by
19 our client in interviews, that he had been there and there
20 was sufficient evidence to render him a party to the
21 offense of capital murder.

22 As far as evidence developed in
23 Mr. Storey's trial, I watched part of it but not all of
24 it. I don't know what was adduced as far as those facts.
25 That was not an issue after -- for our representation.

1 After the trial, our client wanted to resolve his capital
2 murder accusation.

3 Q. Let me ask you, did you find it odd that --
4 after the trial of Mr. Storey, did you find it odd that
5 the offer of life was still on the table for Mr. Porter?

6 A. It was not still on the table. We went and
7 affirmatively sought it out. We conferred with our client
8 first, then we went and saw Mr. Foran. I recall him
9 saying, I need to talk to the victim's family. And I
10 wasn't offended by that. That would be a customary step
11 the prosecution would take. And I don't remember the
12 schedule. Within two or three days, he called back and we
13 set this up.

14 I'm really not answering your question, but
15 this is sequentially what I remember, is we went to our
16 client again, and we were ready to do it one day and he
17 had two or three people he wanted to come to the plea, so
18 that caused a couple day delay. But we -- I think we
19 resolved it 11 days after the verdict, is my recollection.

20 Q. Thank you for that clarification.

21 Do you recall was it, in fact, Tim Moore
22 that first approached Christy regarding this?

23 A. I think -- I recall Mr. Moore and I both going
24 to see Mr. Foran. I don't remember having a conversation
25 with Ms. Christy Jack at all about my client Mark Porter.

1 Q. And you did mention that Mr. Foran said that he
2 wanted to go speak with the Cherrys about the life offer?

3 A. Yes, sir. I think during that conversation he
4 gave us some indication that he himself was amenable to
5 that, but he wanted to talk to them before he firmly
6 offered it. I think that's the sequence. And I wish I
7 had a perfect memory.

8 Q. We all do. Fair enough.

9 You would consider that to be a matter of
10 course for a prosecutor, if they were going to offer life
11 without parole, to speak with the family, wouldn't you,
12 the victim's family?

13 A. Yes, sir, with the caveat that it had been
14 offered previously. The new circumstances are that the
15 other defendant had been through a trial, a death penalty
16 had been attained, so it was kind of a new landscape, so
17 to speak. But yes, sir, I would -- I saw nothing unusual
18 about that.

19 Q. Then I would ask you at that point, after --
20 whatever point that you recall seeking out the life offer
21 from the prosecutors, did you think it odd that they were
22 still amenable to it after they had secured a guilty
23 verdict and then the penalty of death against Mr. Storey?
24 Did you think it odd that they were willing to consider
25 y'all's request for a life offer for Mr. Porter?

1 A. I don't guess I thought about that because I
2 knew it had been offered previously. I remember the
3 conversation was nobody accused us of coming and asking
4 for something outlandish or outrageous. It seemed the
5 normal course of business. As we went into that meeting,
6 we did not know what the results or response would be.
7 But it came.

8 MR. BRAGG: Nothing further, Your Honor.

9 THE COURT: Anything?

10 MR. HAMPTON: Would your -- yes.

11 REDIRECT EXAMINATION

12 BY MR. HAMPTON:

13 Q. Would your conversations with Robert Foran have
14 been a little bit different had you known that the Cherrys
15 were opposed to the death penalty?

16 A. I would have certainly mentioned that as part of
17 a negotiation. I don't mean to be legalistic about it,
18 but it's the prosecution's decision to move forward or not
19 move forward. But I would have certainly discussed that.

20 And when he's made the statement to me I've
21 got to check with the family, I'd have stopped him in
22 mid-sentence and said, well, I believe their beliefs are
23 already that they were in favor of this, so what are you
24 checking with them for, or something to that effect. I
25 don't know. Yes, it'd have been a completely different

1 context of conversation.

2 Q. And in your -- in the normal course of your
3 representation in death penalty cases, do you usually
4 think it's a good idea to reach out and -- to the
5 survivors of the murder victim and have a conversation
6 with them about their feelings and thoughts?

7 A. If you have not had a door slammed in your face
8 recently and hope that one is, it's just -- it's such a --
9 such a strange dynamic. You approach somebody with a
10 phone call or knock on a door or reach out to them with a
11 email message, I'd like to talk to you about this, I've
12 never done that, I guess for the fear that I suspect it
13 will prove futile.

14 And then to say, hi, how do you feel about
15 the death penalty, especially in this case? And I'm not
16 saying this because the issue in this matter before Judge
17 Young right now, but I expect that to be something the
18 prosecutors might let me know. That's what I would
19 expect.

20 Q. In other words, it's reasonable to assume that
21 in most cases the survivors of the murder victim are not
22 eager to speak with the attorney representing their loved
23 one's killer?

24 A. That would be accurate.

25 Q. I want to ask you about a few -- do you know

1 Larry Moore?

2 A. Very well.

3 Q. How about Bill Ray?

4 A. Very well.

5 Q. And Tim Moore is two doors down from you, I
6 think?

7 A. Yes, sir.

8 Q. How would you characterize their character for
9 honesty?

10 A. I've known Larry Moore 38 -- 39 years. If Larry
11 Moore is speaking to you, he is speaking the absolute,
12 unequivocal truth. I don't know a more solid lawyer in
13 this community.

14 Bill Ray is an honest person. Tim Moore is
15 an honest person. Both fine lawyers and a credit to our
16 profession.

17 Q. All right. Do you know Christy Jack?

18 A. Yes, sir.

19 Q. Do you have an opinion about her character for
20 honesty?

21 A. I don't know Christy that well. I don't know
22 her well enough to put her on a plateau I would with Larry
23 Moore or Bill Ray or Tim Moore.

24 Q. Okay. She argued to the -- Christy Jack
25 testified yesterday that the Cherrys told her that they

1 were opposed to the death penalty for Mr. Storey and for
2 Mr. Porter, but that later during the trial, Glenn Cherry
3 said words to the effect of, do you want me to testify for
4 the death penalty, I think it was after Mr. Storey's
5 mother testified.

6 Had you -- had this case -- had you been
7 the defense lawyer, what would your reaction have been to
8 this argument that's from the record, Volume 39, pages 11
9 through 12 --

10 MR. BRAGG: At this point, I'm going to
11 object. Larry Moore was the appropriate person to ask,
12 and they did. At this point I don't know what relevant
13 testimony this witness can offer as to this fact.

14 MR. HAMPTON: Well, he's got expertise in
15 death penalty cases and can give you insight into what a
16 well-experienced lawyer is going to react to the very
17 representation that's central to all four claims that's
18 before the Court.

19 MR. BRAGG: Then to the point they are
20 calling him as an expert -- some expert lawyer to come in
21 here and testify as to the ultimate issues before this
22 court, that's just clearly inadmissible at this point. It
23 would be akin to calling an expert lawyer to come in and
24 testify whether another lawyer was ineffective.

25 THE COURT: Well, I'm going to permit the

1 development of the record and the testimony. The Court
2 will, again, have to sort all this out. So I'm going to
3 allow the response. Overruled.

4 Q. (BY MR. HAMPTON) Here's the relevant argument.
5 Christy Jack says to the jury, so we get to the last
6 question. What she's referring to, as you know, there's
7 three questions in the death penalty case, the third one
8 being mitigation. You understand that?

9 A. Yes, sir.

10 Q. So we get to the last question, and that is,
11 taking into consideration everything, ladies and
12 gentlemen, beginning with the circumstances of this crime,
13 and you know what, his, referring to Mr. Storey's, his
14 whole family got up here yesterday and pled for you to
15 spare his life. And it should go without saying, these
16 are her words, and it should go without saying that all of
17 Jonas' family and everyone who loved him believe the death
18 penalty is appropriate.

19 In light of her knowledge that the Cherrys
20 were opposed and that there was some conversation from
21 Glenn Cherry, how would you characterize this kind of an
22 argument and what would be your reaction?

23 A. My reaction if I'm sitting at defense counsel
24 table?

25 Q. Yes.

1 A. It would be twofold. If I was not aware of it
2 and I had no knowledge of that information, I guess I
3 would have some belief or reliance the prosecutor making
4 that argument had some good faith belief that that's true.

5 And you're sitting there scrambling in your
6 mind, if I -- well, first off, it would appear to the jury
7 from the outside looking in that that probably would be
8 true. So your objection would be simply drawing more
9 attention to it. Had I been saddled with the knowledge of
10 knowing that is inaccurate, an untrue statement, I'd first
11 been on my feet. I'd been up at the Bench at least,
12 outside the jury's presence, representing to the Court
13 that an argument's just made that is factually untrue.

14 And that's -- when a prosecutor seeks a
15 death penalty, they've got to approach it with more valor
16 and honor than anything else they do. There's no room for
17 corner-cutting or cheating. And I guess I'd be scrambling
18 for every bit of relief I could get to get a negative
19 ruling, meaning I guess saying, can I reopen, Your Honor,
20 and I want to put Mr. and Mrs. Cherry up here to say, no,
21 that's not true, and let the jury now hear that. That's
22 highly unusual during the course of an argument.

23 But I would stair-step it up to the point I
24 got a negative ruling, seeking every bit of relief I could
25 and corrections and instruction from the Court at least to

1 disregard the argument. I'd want to make darn sure the
2 Court at least tried to let the jury know the basis on
3 which it should be disregarded. But, I mean, that's what
4 you have to do to preserve anything.

5 But I also in a death penalty context,
6 especially in a special issue submission, you've got to
7 correct the information too, not just some relief from the
8 Court. That's leaves the jury wondering what's that all
9 about.

10 Q. So had you known it, you would have made
11 a pretty big deal about it?

12 A. It would have been several hours resolving that,
13 yes, sir.

14 Q. Fair enough.

15 MR. HAMPTON: Pass the witness.

16 THE COURT: Any further questions from the
17 State?

18 MR. BRAGG: Just a few, Your Honor.

19 RECROSS-EXAMINATION

20 BY MR. BRAGG:

21 Q. Have you ever chosen to not object to something
22 you found objectionable in a prosecutor's closing
23 argument?

24 A. Yes, sir. I can't think of something specific
25 right now. But yes, sir, there's tactical reasons.

1 That's correct.

2 Q. Yes, sir. I'm just asking general questions
3 here.

4 And are there sometimes reasonable trial
5 strategies for a defense attorney not to do so?

6 A. Yes, sir.

7 Q. What would some of those be?

8 A. Oh, drawing additional attention to something
9 that has already been damaging anyway. And if it's a
10 factually inaccurate statement, that would never go
11 unaddressed by way of objection, if that's what you're
12 asking. But sometimes there's just -- every case is
13 different and the dynamic of the facts are different.
14 Sometimes your strategy is just to hope the jury doesn't
15 listen to everything and don't draw additional attention
16 to it.

17 MR. BRAGG: Pass the witness, Your Honor.

18 THE COURT: Anything else?

19 MR. HAMPTON: Nothing further.

20 THE COURT: All right. Is there further
21 need of Mr. Daniel from either side?

22 MR. HAMPTON: No, he's free.

23 MR. BRAGG: No, Your Honor.

24 THE COURT: Thank you. You may go about
25 your way.

1 THE WITNESS: Yes, sir.

2 (Witness leaves courtroom)

3 THE COURT: It's almost 11:45. Is there
4 another short witness that can be called?

5 MR. WARE: I believe we have Mr. Ray
6 available. We can call him.

7 THE COURT: Will he be a short witness?

8 MR. HAMPTON: I think so.

9 MR. WARE: Or we can break for lunch.

10 THE COURT: Well, why don't we get him on
11 and see how short he's going to be. We can always recess
12 for lunch. So if he's outside. Mr. Ray.

13 MR. WARE: Your Honor, may I take a short
14 break?

15 (Discussion off the record)

16 (Witness enters courtroom)

17 THE COURT: I believe you were here
18 yesterday.

19 THE WITNESS: I was sworn in.

20 THE COURT: You were sworn in?

21 THE WITNESS: Yes, sir.

22 THE COURT: That's my recollection. So you
23 may be seated.

24 Do you need to wait for Mr. Ware?

25 MR. HAMPTON: I think so.

1 THE WITNESS: I'll turn my phone off,
2 Judge.

3 (Discussion off the record)

4 THE COURT: I believe we're ready to
5 continue. Mr. Ware, this is your witness; is that right?

6 MR. WARE: Yes, sir.

7 WILLIAM "BILL" RAY,
8 having been previously duly sworn, testified as follows:

9 DIRECT EXAMINATION

10 BY MR. WARE:

11 Q. Would you state your name, please.

12 A. My name is William Ray, R-A-Y. I go by Bill.

13 Q. Bill, what do you do for a living?

14 A. I'm an attorney.

15 Q. And what kind of law do you practice?

16 A. I practice criminal law, mostly in this county.

17 Q. Okay. How long have you been an attorney?

18 A. I've been an attorney since November of 1985,
19 which would be about a month and a half short of 32 years.

20 Q. Okay. What was your first job out of law
21 school?

22 A. I was a briefing attorney for the Court of
23 Criminal Appeals.

24 Q. And then what did you do after that?

25 A. I was a prosecutor at the Tarrant County

1 District Attorney's office for three-and-a-half years.

2 And I've been in private practice since then.

3 Q. So you've been in private practice since?

4 A. Since January 1st of 1990.

5 Q. Primarily in criminal defense?

6 A. Primarily. I've done a few civil things, but
7 mostly criminal defense.

8 Q. Are you board certified?

9 A. I am. I'm board certified in criminal law. I'm
10 board certified in criminal appellate law. I've been
11 recertified in each one of those one time.

12 Q. Have you -- how many -- or have you ever handled
13 death penalty cases?

14 A. I've tried seven, counting Mr. Storey's.

15 Q. Seven to verdict?

16 A. Seven to verdict, that's right. I picked the
17 juries in two more. One we finished picking the jury, and
18 then one we had about ten jurors and they were settled.

19 Q. And -- and at -- at some point you became or you
20 were appointed to represent Paul Storey, the man sitting
21 here at the table with us?

22 A. I was, yes.

23 Q. Okay. Do you remember when that was?

24 A. I've got my affidavit here. If I could look at
25 it, I could tell you.

1 Q. Sure. You have -- you bring that up. You have,
2 in fact, submitted an affidavit in this case that was
3 actually attached to the pleadings; is that correct?

4 A. I'm assuming you attached it to the pleadings.
5 And I don't say the day I was appointed. I could probably
6 look, but it was right after --

7 Q. Does October of 2006 sound right?

8 A. That's right. I was trying to think whether it
9 was October or November.

10 Q. Okay. By the way, is everything in your
11 affidavit true and correct?

12 A. It was true at the time I wrote it. I --
13 there's a paragraph on the second page that says, I have
14 not seen an affidavit from any person in regards to this
15 issue. At the time I wrote that, that was true. But
16 since then, I saw the affidavit that Mark Daniel wrote and
17 Tim Moore wrote.

18 Q. Okay. So did you see Larry Moore's affidavit?

19 A. I did not.

20 Q. Would -- so you were first chair on the case?

21 A. I was.

22 Q. Okay. And do you remember when the indictment
23 was?

24 A. I don't.

25 Q. Does January the 12th of 2007 sound right?

1 A. That would be right. It would be close to that.

2 Q. Okay. And sometime around the indictment you
3 got appointed or a second chair was appointed; is that
4 correct?

5 A. I asked that Judge Berry appoint Larry Moore,
6 and she did.

7 Q. Okay. And to your knowledge, at that point the
8 State was seeking the death penalty in this case?

9 A. As far as I could tell, yeah.

10 Q. Okay. And, of course, that's, you know, one
11 grounds for asking a judge to appoint co-counsel?

12 A. At the time it was. Now they don't do it that
13 way.

14 Q. And, you know, why did you seek Larry Moore as
15 co-counsel?

16 A. Because Larry Moore was a very experienced
17 lawyer. I felt like I wanted someone who had more
18 experience than me if I could get one. Mr. Storey's case
19 was the fourth death penalty I tried that went to trial.
20 And so I tried three before that. And I just wanted
21 somebody that I thought would be good. And Larry and I
22 were good friends. I felt like he was very knowledgable.
23 And so I asked him if he would do it, and he said he
24 would.

25 Q. Would you agree that Larry has impeccable

1 integrity?

2 A. I would say so.

3 Q. So y'all commenced to preparing for trial
4 investigating the case and such; is that correct?

5 A. That's true.

6 Q. Okay. And that included discussions with -- who
7 were the prosecutors you dealt with?

8 A. It was Christy Jack and Robert Foran.

9 THE WITNESS: Judge, could I ask you a
10 question. I wanted to ask you this before I came in here.
11 I wanted to make sure that Mr. Storey, before we start
12 talking about this case, is waiving any kind of
13 confidentiality that he and I have. I think he's done
14 that before. Before I start -- if we get into what he
15 said or what we did, I --

16 MR. WARE: Well, we're not waiving
17 confidentiality. Certainly within the parameters of this
18 hearing, we've gone into that. But we're not waiving it
19 for all purposes.

20 THE COURT: All right. Well, so are your
21 questions going to be tailored to avoid that?

22 MR. WARE: Yes. I mean, mine will be.

23 THE COURT: You may proceed.

24 MR. WARE: Thank you.

25 Q. (BY MR. WARE) So this -- well, who were the

1 prosecutors you dealt with?

2 A. Robert Foran and Christy Jack.

3 Q. And who did you deal with mostly?

4 A. It was about the same. I mean, I got to -- when
5 I found out we were doing this, I would try to figure out
6 which one of them was considered the first chair. I think
7 it was Robert. But I can't say that for certain. I mean,
8 they would know.

9 Q. And during -- during the course of your talks
10 and, I don't know, disclosures they made, discovery they
11 made, was this an open-file case?

12 A. Yes, as far as I could tell. It was a paper
13 file.

14 Q. So you had access to the DA's file --

15 A. Yeah.

16 Q. -- and such?

17 Did Robert Foran or Christy Jack ever
18 disclose to you in any way that Jonas Cherry's parents
19 were opposed to the death penalty?

20 A. I can't say they did and I can't say they
21 didn't. I don't remember.

22 Q. Okay. Does that seem like an extraordinary
23 thing that they would pursue the death penalty in light of
24 the fact that the parents were opposed -- I mean,
25 extraordinary enough that's something you would remember?

1 A. Well, it seems like it would be, but I'm not --
2 I mean, I can't say it wouldn't be absolutely. I mean,
3 I've never had one where they weren't, let me put it that
4 way.

5 Q. Where they weren't in favor?

6 A. That's right. And the one I had before
7 Mr. Storey, the person -- the mother of the person that
8 was killed was emphatically in favor of the death penalty
9 for my client. And she still is. He's still on death
10 row.

11 Q. Okay. That doesn't seem all that unusual?

12 A. That doesn't seem unusual.

13 Q. I mean, it's kind of like the old, you know, dog
14 bites man is not a story, but the opposite -- the opposite
15 is very memorable and a story, correct?

16 A. Yeah, I guess I would agree with that.

17 Q. I mean, not to trivialize the issue, but -- but
18 it's something unusual enough about the case and in your
19 experience that that's something that you would remember?

20 A. I would think so.

21 Q. Okay. And you've looked through your files, did
22 you see anything in your file denoting that that was the
23 case?

24 A. I did not. And I did look through my file, and
25 I actually looked at it twice.

1 Q. Okay. And so it is also something significant
2 enough that not only would you remember it, you probably
3 would have written it down?

4 A. You know, I can't say that, Mike, because I
5 can't say for certain that they didn't tell me or did. I
6 mean, it would seem that they would. And it would seem
7 that I would have some memory of that. But I cannot sit
8 here and tell you that I remember them telling me that or
9 not remember them telling me.

10 Q. Do you remember seeing anything about that in
11 the prosecutors' file?

12 A. I never saw anything in the prosecutors' file.

13 Q. About that?

14 A. About that, that's correct.

15 Q. Okay. Does it also seem like something, you
16 know, with your close relationship with Larry Moore on
17 this case that you would have told him about?

18 A. I think if it had come to either one of our
19 attention we would have discussed it.

20 Q. Okay.

21 A. So that -- I mean, the answer to your question
22 specifically would be yes. But I think if he had seen
23 that, he would have told me too.

24 Q. And vice versa?

25 A. Yeah, that's what I meant.

1 Q. Okay. Now, you mentioned that had you known
2 about this -- about the Cherrys' opposition to the death
3 penalty, there would have been certain steps that you
4 would have taken, correct?

5 A. I think if I'd known that and that was a fact
6 that I was aware of, I think what my position would have
7 been would have been to try to get the State to just waive
8 the death penalty and try it as a waiver.

9 I mean, they made him an offer of life.

10 Q. Right. I understand.

11 A. So they -- and it's not my prerogative for any
12 of that. But if I'd known that the -- that Jonas Cherry's
13 family didn't want the death penalty, my pitch would have
14 been to them, why don't you waive the death penalty.

15 Q. And do you remember Christy Jack's argument
16 where she argued that Jonas Cherry's -- or it should go
17 without saying that Jonas Cherry's family and everyone who
18 loves him is -- believes the death penalty is appropriate?
19 You remember that?

20 A. I remember that. And I've read it since then.

21 Q. Okay. Do you think if you'd known that that
22 was, in fact, not true, you would have, in fact, objected
23 to that?

24 A. I think I would have. And I think my affidavit
25 says -- my affidavit -- like the next to last line, says:

1 I would have lodged an objection. But I do -- let me --
2 if I could say this. When she said that, it kind of
3 caught me a little offguard.

4 When you're trying a death penalty case and
5 you're at the final argument of the final thing, you're
6 kind of -- part of me is trying to think about everything
7 that I did, and then I'm listening to what the prosecutor
8 says. Sometimes when a prosecutor says something, if I
9 don't agree with it or I think it's objectionable, I will
10 object. But sometimes if they say something and I don't
11 agree with it, I might not object because I don't want to
12 call attention to it.

13 And I can't say what I would have -- I
14 mean, to that extent, I can't say that absolutely I would
15 have lodged an objection because the fact of the matter in
16 this case is after she said that, she went on to something
17 else.

18 And it might sound good that I would have
19 made an objection. I just can't say for certain that I
20 would have done that. I think my affidavit says something
21 a little different than that.

22 Q. So as far as you knew at the time she said it,
23 it was the truth, that Jonas Cherry's family and everyone
24 who loved him were in favor of the death penalty?

25 A. I assumed it was true.

1 Q. Okay. And if you had known that, in fact, that
2 it was not true, such as if they had disclosed to you the
3 opposite information, do you feel that you would have
4 objected not only that it was outside the record but that
5 it was, in fact, interjecting an inaccurate fact, a
6 harmful inaccurate fact?

7 MR. OTTOWAY: I think this has already been
8 asked and answered, Your Honor.

9 THE COURT: Well, I'm going to overrule the
10 objection.

11 THE WITNESS: Would you say that again?

12 Q. (BY MR. WARE) Yes. If you had known that that
13 was an inaccurate argument, that it was injecting a fact
14 in front of the jury that was not even true and was, in
15 fact, intended to be harmful to your client, do you think
16 you would have objected had you known it was inaccurate?

17 A. Well, it goes back to what I said initially. I
18 mean, I heard what she said, and it was clearly outside
19 the record, so the --

20 Q. So that's one issue.

21 A. I understand. What I'm getting at is I didn't
22 object to outside the record because I didn't want to call
23 attention to it.

24 Q. I understand that.

25 A. If I had known it was also not factually true, I

1 think I would have been much more likely to have made that
2 objection, not only outside the record but also not
3 factually true. And then I'd have probably said something
4 like, and the prosecutor knows it.

5 But it would have caused a great amount of
6 attention to it as well. I mean, so -- I mean, the
7 objection would have been probably sustained and the jury
8 told to disregard and we'd all gone down the road.

9 Q. Well, Christy Jack knew that too, right?

10 MR. BRAGG: Objection, Your Honor, calls
11 for speculation.

12 THE COURT: I'll allow him to answer if he
13 knows.

14 THE WITNESS: I don't know what she's
15 thinking or what she would have done.

16 MR. WARE: Well, do you think --
17 I'll pass the witness.

18 THE COURT: Does the State have
19 cross-examination?

20 MR. OTTOWAY: No questions.

21 THE COURT: Is there further need of
22 Mr. Ray?

23 MR. WARE: No, Your Honor.

24 THE WITNESS: May I be excused?

25 THE COURT: Yes, without objection you may

1 be excused.

2 All right. It is right at noon and --

3 MR. WARE: As promised.

4 THE COURT: I'd like to thank everyone for
5 a short witness. Why don't we recess until about 1:15.

6 (Court in recess for lunch)

7 (Open court, defendant present)

8 THE COURT: Back on the record this
9 afternoon. Are both sides ready to continue?

10 MR. BRAGG: We are, Your Honor.

11 MR. WARE: Yes, Your Honor.

12 THE COURT: Mr. Ware, I think the next
13 witness you've indicated is going to be Mr. Tim Moore; is
14 that correct?

15 MR. WARE: That's correct, Your Honor.

16 THE COURT: Mr. Moore, I think you were
17 here and sworn in yesterday?

18 THE WITNESS: I was. That's correct.

19 THE COURT: Thank you. You may be seated.

20 THE WITNESS: Thank you.

21 THE COURT: Mr. Ware, you may proceed.

22 MR. WARE: Thank you, Your Honor.

1 TIM MOORE,
2 having been previously duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 BY MR. WARE:

5 Q. Would you state your name, please.

6 A. Tim Moore.

7 Q. And, Mr. Moore, what do you do for a living?

8 A. I'm a criminal defense lawyer here in Tarrant
9 County.

10 Q. Okay. And how long have you been a criminal
11 defense lawyer here in Tarrant County?

12 A. Since May of 1988.

13 Q. What did you do before that?

14 A. I was an assistant district attorney from 1985
15 to 1988 for the Tarrant County District Attorney's office.

16 Q. Okay. Was that your first job out of law
17 school?

18 A. Yes.

19 Q. And during the time -- well, when you were in
20 the district attorney's office, you were there, what,
21 three years?

22 A. Three years.

23 Q. Okay. Did you have an opportunity to handle any
24 death penalty cases while you were in the district
25 attorney's office?

1 A. I was assigned to assist in a death penalty case
2 when I left the DA's office.

3 Q. Okay. It was still pending?

4 A. It was still pending.

5 Q. Okay. And what about as a criminal defense
6 attorney, have you handled any death penalty cases as a
7 criminal defense attorney?

8 A. Yes, I've tried at least six to verdict.

9 Q. Okay. And how many more have you handled that
10 you didn't try to verdict?

11 A. A bunch.

12 Q. Okay. And that's just -- is that cases that
13 start out death penalty or is that all capital cases
14 together?

15 A. All capital cases together.

16 Q. Okay. Are you board certified?

17 A. No.

18 Q. But you are approved and qualified to handle
19 court-appointed death penalty cases?

20 A. I am. In fact, I'm on the committee that
21 approves death penalty lawyers here in Tarrant County.

22 Q. And you're familiar with all the standards,
23 etcetera, that lawyers have to meet before they are
24 approved to be on the death penalty wheel, if you will?

25 A. Yes.

1 Q. Okay. Now, you are -- you were appointed to
2 represent Mark Porter, an individual by the name of Mark
3 Porter back in 2006; is that correct?

4 A. That's correct.

5 Q. And Mark Porter was, as you know, was Paul
6 Cherry's (sic) co-defendant?

7 A. Paul Storey.

8 Q. I'm sorry, Paul Storey's co-defendant.

9 A. Yes.

10 Q. And you were appointed, what, in October of 2006
11 or so?

12 A. October -- I believe it was October 6th of
13 2006.

14 No, I'm sorry, October 30th.

15 Q. Okay. And at the -- initially you were the only
16 attorney appointed on the case?

17 A. That's correct.

18 Q. But shortly thereafter or fairly soon
19 thereafter, within a few months anyway, you were appointed
20 co-counsel; is that right?

21 A. That's right. Mark Daniel was appointed as my
22 co-counsel.

23 Q. Okay. And the indictment was returned sometime
24 in January 2007?

25 A. That's correct.

1 Q. Okay. So is it your memory -- well, it's your
2 understanding that at least at some point, at least early
3 on, that the State was seeking the death penalty against
4 both your client and Paul Storey?

5 A. That's correct.

6 Q. And you -- you and Mr. Daniel proceeded through
7 the case, you had discussions with the district attorney,
8 doing -- conducting your own investigations, and
9 proceeding to trial or proceeding as if you were
10 eventually going to have to go to trial on a death penalty
11 case, at least initially, correct?

12 A. That was our understanding.

13 Q. Okay. And, in fact, is it your memory that
14 y'all were even first in line, that y'all were going to be
15 tried first?

16 A. At one point that was our understanding.

17 Q. Okay. And for scheduling reasons or whatever,
18 y'all ended up switching order and Mr. Storey ended up
19 first in line and actually going to trial first; is that
20 correct?

21 A. That's right. I don't really remember what the
22 conflict was. We were scheduled to go first, but for some
23 reason we didn't, so they tried Mr. Storey first.

24 Q. Okay. Now, at some point even before Mr. Storey
25 went to trial, did the prosecutors offer your client a

1 plea bargain?

2 A. Yes.

3 Q. Okay. What did they offer, to your memory?

4 A. At first they offered kind of a three-prong
5 deal. They offered life to regular murder if he would
6 testify against Mr. Storey, life without parole if he
7 didn't testify against Mr. Storey, or a trial -- death
8 penalty trial.

9 Q. And did your client turn that offer down?

10 A. Yes, he did.

11 Q. And was that -- do you remember when that was?

12 A. I have my file if you want me --

13 Q. Well, let me ask you, would it have been before
14 Mr. Storey went to trial?

15 A. Yes.

16 Q. Okay. Now, did the prosecutors, did Robert
17 Foran -- who were the prosecutors in the case?

18 A. It was Robert Foran, and until recently I really
19 did not remember that Christy Jack was on that case
20 because all of my dealings were with Robert.

21 Q. Okay.

22 A. But I know it was Robert and Christy.

23 Q. Okay. And, of course, your case never went to
24 trial?

25 A. No, it didn't.

1 Q. But in dealing with Robert Foran, did Robert
2 Foran, or Christy Jack for that matter, did they ever
3 disclose to you or Mark Daniel that Jonas Cherry's parents
4 were opposed to the death penalty?

5 A. No.

6 Q. Ever?

7 A. Ever.

8 Q. You're positive?

9 A. I'm positive. I would have -- I have a
10 independent recollection that they didn't. I have no
11 notes that they did. And it's certainly something that
12 would have caused some conversation at least.

13 Q. Okay. At the very least?

14 A. At the very least.

15 Q. Okay. And the same with Mark, they never
16 disclosed to Mark, either one of them or anyone else, that
17 Dr. and Mr. Cherry were opposed to the death penalty?

18 A. Not that he ever informed me.

19 Q. Okay. And he would have informed you?

20 A. We office together.

21 Q. Yes. I mean, number one, that would be --
22 that's a very unusual circumstance, that the State is
23 going forward with a death penalty trial when the parents
24 of the victim are opposed to the death penalty?

25 A. That would be a correct statement, in my

1 experience.

2 Q. Okay. And it's definitely something that you
3 not only would have remembered, you would have discussed
4 with any number of people including Mark Daniel?

5 A. Absolutely.

6 Q. Did you have conversations with Mr. Storey's
7 counsel, Bill Ray and Larry Moore about the case?

8 A. I'm sure we did.

9 Q. Okay.

10 A. I remember -- I remember Larry -- they were kind
11 of peeved that they had to go first.

12 Q. Yeah, okay. But I take it that in none of those
13 conversations did they say, hey, have y'all heard, did
14 y'all hear this, the Cherrys are opposed to the death
15 penalty?

16 A. We never -- we never discussed that, never heard
17 it, never was brought up in any conversation anywhere.

18 Q. Does it seem natural that it would have been if
19 they had been told even if y'all hadn't been told?

20 A. In my personal opinion it would be. It would
21 have been something we would have discussed.

22 Q. Is it something that -- that possibly the entire
23 courthouse, knowing how this courthouse is, might have
24 been discussing it?

25 A. It's probably something that would have got out

1 and been discussed.

2 Q. Okay.

3 A. As far as death penalty cases are concerned,
4 with the parents not adamant about seeking the death
5 penalty.

6 Q. And the State seeking the death penalty anyway;
7 is that correct?

8 A. That's correct.

9 Q. I mean, the State always has the option of
10 waiving the death penalty?

11 A. Yes, they do.

12 Q. Okay. And that's, you know, a very different
13 set of circumstances when you are facing a waiver as
14 opposed to when you're facing the possibility of the
15 ultimate punishment of death, correct?

16 A. That's two different animals.

17 Q. Completely?

18 A. Completely.

19 Q. Okay. Now, what actions, if you had been
20 informed that the Cherrys or if you knew that the
21 Cherrys -- if it had been disclosed to you that the
22 Cherrys were opposed to the death penalty, what actions do
23 you believe you and/or Mark would have taken in the case
24 as far as representing your client?

25 A. If we had known that they -- that the parents

1 were against the death penalty --

2 Q. And the State's proceeding to a death penalty
3 trial anyway in your case.

4 A. Well, if we were going to trial, we would
5 certainly, number one, try to use that to get the State to
6 waive the death penalty. I mean, obviously, as a plea
7 bargain, that would be my number one thought at the moment
8 is just, you know, talk to Foran and say, hey, why are
9 y'all seeking the death penalty when you always go to the
10 family and get what they desire, get their feelings, and
11 they don't want it, so why -- you know, what are we doing
12 here.

13 Q. So y'all never had those conversations?

14 A. No.

15 Q. And that's because y'all had no clue that the
16 Cherrys were, in fact, opposed to the death penalty?

17 A. That's correct.

18 Q. Is it generally the case when the State is
19 proceeding to a death penalty -- in a death penalty case,
20 that they've made it clear that they're going for the
21 death penalty, is it generally the assumption that the
22 family or the close ones, the survivors of the capital
23 murder, if you will, are in favor of the death penalty?

24 A. That would be my opinion, yeah.

25 Q. Has that been your experience as well?

1 A. It has been my experience.

2 Q. Okay. Do you think maybe even you and Mark, you
3 and/or Mark would have gone to Tim Curry with this
4 information if you had it?

5 A. We have in the past on cases, and we did in the
6 fut-- of course, he died shortly thereafter. But he was
7 very approachable about going to him and saying, here's
8 some reasons why y'all shouldn't seek the death penalty on
9 our client. And if -- I'm certain if we had known that
10 the Cherrys were not in favor of seeking the death
11 penalty, that would have been an avenue to explore.

12 Q. Now, do you normally in a death penalty case
13 seek to interview the parents of the victim?

14 A. No.

15 Q. Have you ever?

16 A. No.

17 Q. You would not fault any lawyer, whether it's a
18 trial lawyer or a post-conviction writ lawyer, for failing
19 to seek to interview the parents of the victim?

20 MR. BRAGG: Objection, Your Honor,
21 argumentative.

22 THE COURT: Well --

23 MR. WARE: Well, let me ask it in a more
24 neutral way.

25 THE COURT: All right. You may rephrase

1 it.

2 Q. (BY MR. WARE) Would you ever fault a defense
3 trial lawyer or even a post-conviction appellate lawyer
4 for not going and interviewing the parents of the victim
5 in a death penalty case?

6 A. No.

7 Q. To you that does not show a lack of due
8 diligence?

9 A. No.

10 MR. BRAGG: Objection, Your Honor, calls --
11 goes to ultimately what you --

12 THE COURT: I'm going to overrule the
13 objection and allow the question and answer.

14 MR. WARE: Thank you.

15 Q. (BY MR. WARE) You've never done it?

16 A. I've never done it.

17 Q. What about Mark, to your knowledge has he ever
18 done it?

19 A. To my knowledge he's never done it.

20 MR. WARE: We'll pass the witness.

21 THE COURT: The State may cross-examine the
22 witness.

23 CROSS-EXAMINATION

24 BY MR. BRAGG:

25 Q. First of all, good afternoon, Mr. Moore.

1 A. Hi.

2 Q. So the offer of life for Mr. Porter, you said
3 there was kind of a three-pronged decision, if you will,
4 correct?

5 A. Right.

6 Q. You had the offer of life to murder, the offer
7 of life without parole to capital murder, correct?

8 A. Correct, without testifying.

9 Q. Right. Without testifying, thank you for the
10 clarification. And then that was eventually withdrawn or
11 did that --

12 A. No, he rejected it.

13 Q. He rejected it. Okay. At what point did the
14 offer of life come back into play regarding Mr. Porter?

15 A. Shortly after Mr. Storey's verdict.

16 Q. Okay. And how did that offer come into play?
17 Who approached who, I guess?

18 A. I -- if I remember correctly, Mr. Storey's
19 verdict came back very quickly. And Mark and I said we
20 might want to revisit both our client and Robert Foran
21 about this life without parole offer because, of course,
22 life to regular murder would be gone. So either Mark or
23 both of us went and talked to Mr. Porter. And he -- he
24 was rather agreeable to see -- for us to go and talk to
25 Robert Foran about the life without parole offer. And

1 that's what we did.

2 Q. Were you present during Mr. Storey's trial?

3 A. I remember ducking in for parts of it. I
4 couldn't be there for the whole thing.

5 Q. Sure, of course. But you did come in during
6 parts of it when you could?

7 A. Right.

8 Q. Were you there during the closing arguments?

9 A. No.

10 Q. I'm sorry, the closing arguments for the
11 punishment phase?

12 A. No.

13 Q. Okay. Were you there during any portion -- were
14 you there before the jury came back while they went -- you
15 know, you hear the arguments, the jury goes out. Did you
16 enter the courtroom before the jury had come back in?

17 A. On punishment?

18 Q. Yes, sir.

19 A. No.

20 Q. So -- but as soon as the jury came back out,
21 gave their verdict, at what point did you and Mark find
22 out about the verdict?

23 A. That afternoon or that morning, whenever they
24 came back.

25 Q. So it's your testimony that you found out just

1 through the grapevine, I guess?

2 A. That would be my best recollection.

3 Q. Okay. So after the verdict to give -- of
4 course, at that point Mr. Storey had already been
5 convicted of the capital murder, but now he has the death
6 sentence. Did you find it odd that the State was willing
7 to entertain your request for a life without offer -- life
8 without parole offer?

9 A. Did I find it odd? It's been my experience that
10 prosecutors don't like to try cases twice, and I think it
11 was our duty to seek to resolve it that way. And so, no,
12 I didn't think it was odd. I thought it was kind of
13 normal, to tell you the truth.

14 Q. Where they had already gotten a conviction, I
15 mean, they'd already tried the case once. But your point
16 is well taken, not wanting to try it twice. But they'd
17 already tried the case once, correct?

18 A. Right.

19 Q. And gotten the guilty, correct?

20 A. Correct.

21 Q. And then they put on their case to put the --
22 the question of life and death before the jury, correct?

23 A. Correct.

24 Q. But you still didn't find it odd that they were
25 willing to consider at that point, when they were probably

1 already ready to go for Mr. Porter, you didn't find it odd
2 at all that they were willing to consider life without
3 parole at that point?

4 A. I don't know if I'd call it odd. I mean -- or I
5 don't think I'd call it unusual. I just don't.

6 Q. Sure. Let me ask you, during -- during opposing
7 counsel's closing arguments, have there ever been a time,
8 just generally speaking, I don't need any specific
9 examples, but generally speaking, has there ever been a
10 time where you did not object to a particular statement in
11 closing arguments even though you knew it to be
12 objectionable?

13 A. Oh, sure.

14 Q. Of course, there's reasonable strategies for
15 doing that?

16 A. Absolutely.

17 Q. What would some of those be?

18 A. Well, you don't want to draw as much attention
19 to it as you have to. You know, closing arguments are
20 usually going to get overruled, so it just draws extra
21 attention to it. May not hurt you as bad as you -- even
22 though it's objectionable, it may not hurt you too bad.
23 Maybe something in their opening that you can respond to
24 that maybe it opened up your response to it.

25 Q. I'd like to ask you about Ms. Jack. You've had

1 experiences trying cases against Ms. Jack?

2 A. I have.

3 Q. Besides this one?

4 A. Yes.

5 Q. Okay. And that, of course, would be when
6 Ms. Jack was the prosecutor and you were the defense
7 attorney?

8 A. That's correct.

9 Q. Okay. Have you had experiences trying cases
10 with Ms. Jack since she's come over to be a defense
11 attorney?

12 A. Yes, I have.

13 Q. About how many would you say?

14 A. Since she's been a defense lawyer?

15 Q. Yes, sir.

16 A. We just finished one Friday.

17 Q. Okay. Was that a capital case?

18 A. It was -- it started out a capital case.

19 Q. Okay. Was that the only capital case you tried
20 with Ms. Jack?

21 A. Yes.

22 Q. Okay. So you say it started out a capital case,
23 it became a waiver case?

24 A. It actually became an open plea to injury to a
25 child.

1 Q. Okay. And during the trial of that case, did
2 Ms. Jack question witnesses?

3 A. Yes, she did.

4 Q. Did Ms. Jack give closing argument?

5 A. Yes.

6 Q. And you said that this was just concluded a week
7 ago?

8 A. Friday, last Friday.

9 MR. BRAGG: No further questions, Your
10 Honor.

11 THE COURT: Any other questions from the
12 Applicant?

13 REDIRECT EXAMINATION

14 BY MR. WARE:

15 Q. You're aware that certainly one of our -- or the
16 crux of most of our claims in this case has to do with
17 Christy Jack's closing argument; is that correct?

18 A. Right. I understand.

19 Q. And you know what that closing argument was,
20 right?

21 A. I do.

22 Q. And let me ask you, if -- it's one thing if --
23 well, if a prosecutor -- you talked in general about
24 objecting to improper arguments, etcetera.

25 But let's give the hypothetical, a more

1 specific hypothetical where a prosecutor interjects a
2 statement that is out -- not only outside the record,
3 outside the evidence, but is a harmful lie. Is there any
4 doubt in your mind that you're going to jump up and make a
5 big stink and objection about that?

6 A. Is there any doubt that I would?

7 Q. Yes.

8 A. There is no doubt that I would.

9 Q. You not only want an objection, you want the
10 record corrected?

11 A. Absolutely.

12 Q. And what else? A mistrial?

13 A. Well, you have to ask for a mistrial, yeah.

14 Q. Okay. You're not going to let that lie stand,
15 if you know it's a lie?

16 A. If I know it's a lie in a jury argument, it
17 doesn't get more egregious than that, especially in a
18 death penalty case, much less any other kind of case.

19 Q. Okay. And the statement that Christy Jack made
20 in this case, assuming that it is inaccurate -- I mean,
21 number one, it's outside the record, right?

22 A. Right.

23 Q. And assuming that it's inaccurate and that the
24 Cherrys were actually opposed to the death penalty, is
25 that the kind of misstatement that rises to that -- you

1 said does not get more egregious than that?

2 A. In my opinion, that's true.

3 Q. Now, you said you'd tried cases, counsel asked
4 you if you'd tried cases against Christy Jack when she was
5 a prosecutor?

6 A. Yes.

7 Q. Did she pull something very similar in one of
8 your cases?

9 A. She --

10 MR. BRAGG: Objection, Your Honor. This is
11 actually going into the same conduct prior -- I assume
12 it's going to the prior act of conduct that we've had --
13 objected to and had sustained.

14 MR. HAMPTON: If I understand the objection
15 correctly, he's objecting to propensity evidence, namely,
16 that Christy Jack has a propensity to introduce false
17 evidence during her final arguments, and that would be
18 correct. However, there's an exception to that rule under
19 404(b) and it applies.

20 THE COURT: I'm going to sustain the
21 objection at this time to the question that was asked.

22 Q. (BY MR. WARE) Well, let me ask you this. When
23 you heard that she argued outside the record, and even
24 falsely in this case, based on your experience, did that
25 surprise you?

1 A. No.

2 Q. In your experience, did she get away with it
3 then?

4 MR. BRAGG: Objection, Your Honor. I mean,
5 we're now going into -- he's asking the same question just
6 asked that you sustained.

7 THE COURT: I'm going to sustain the
8 objection.

9 Q. (BY MR. WARE) Let me ask you, did you object?

10 A. I did.

11 MR. BRAGG: Objection, Your Honor. We're
12 talking about the prior instance, and discussion of the
13 prior instance, it's been sustained.

14 MR. WARE: Well, I think intent is an
15 element here, Judge, and I think this goes to the intent
16 of the prosecutor, that she has done this before and the
17 judge in that case let her get away with it.

18 THE COURT: Well, I understand. I'm going
19 to continue to sustain at this time.

20 MR. WARE: Your Honor, once again, it's
21 been suggested perhaps, not so much now, I anticipate it's
22 going to be suggested that this was a slipup or a misstep
23 or two lines in a much longer argument. We believe it was
24 totally calculated and intentional, and I think that makes
25 a difference. And this would go to that.

1 THE COURT: Any other response?

2 MR. BRAGG: Well, to the degree they wanted
3 to elicit testimony about that, the appropriate person to
4 elicit testimony from is Ms. Jack. But again --

5 MR. WARE: What, that she did it
6 intentionally and maliciously?

7 MR. BRAGG: Your Honor, the Court has
8 already sustained this objection -- sustained several
9 objections now to this exact line of testimony and
10 sustained for very good reasons, I think.

11 MR. WARE: Well, we'd like to put it on for
12 the record, Your Honor.

13 THE COURT: Well, similarly the Court will
14 sustain the objection. But if you want to make some sort
15 of bill or something, you can do that.

16 MR. WARE: Okay. May I do that now?
17 We're almost through with this witness.

18 MR. BRAGG: Can we do it at the end of
19 testimony just so we're clear as to what is testimony and
20 what is the offer of proof.

21 THE COURT: Why don't we do it at the end
22 just to separate it.

23 MR. WARE: Okay. I'm done. I pass the
24 witness. I'm ready to make a bill.

25 MR. BRAGG: Then no further questions, Your

1 Honor.

2 THE COURT: All right. We'll proceed then
3 to the bill.

4 VOIR DIRE EXAMINATION

5 BY MR. WARE:

6 Q. What was your experience with Ms. Jack?

7 A. We were trying a murder case, and there were my
8 client and another co-defendant, and it was a -- one of
9 these drug house killings. There's only three people in
10 the room. And the co-defendant testified against my
11 client. And they, of course, the DA's office had him
12 polygraphed.

13 Q. The co-defendant?

14 A. The co-defendant, by Rick Holden over in Dallas,
15 their favorite polygraph examiner. And my client was
16 testifying -- well, they sent the co-defendant to Rick
17 Holden, the polygraph examiner, and he passed on whether
18 or not he was the shooter. Okay.

19 Q. On whether or not the co-defendant or your
20 client?

21 A. The co-defendant.

22 Q. Okay.

23 A. And so my client testified, and he testified
24 that he -- talking to the prosecutors, and he said, y'all
25 got the wrong guy. And Ms. Jack interjected, well, but he

1 passed a polygraph. And I objected -- this was in front
2 of jury. I objected, and Judge Gill sustained my
3 objection. And I asked for a mistrial.

4 Q. That was denied?

5 A. That was denied.

6 Q. So she got away with it?

7 A. She got away with it.

8 Q. I mean, that was flagrantly improper, was it
9 not?

10 A. In my opinion absolutely.

11 Q. And do you think the instruction to disregard
12 was effective with the jury?

13 A. I highly doubt it.

14 Q. And everybody knows polygraph evidence is not
15 admissible, right?

16 A. Everybody.

17 Q. Including Ms. Jack?

18 A. Absolutely.

19 Q. But she did it anyway?

20 A. Yes, she did.

21 MR. WARE: I'll pass the witness.

22 THE COURT: I think both sides were
23 concluded.

24 MR. WARE: And I offer that for the -- for
25 all purposes, Your Honor.

1 MR. BRAGG: For purposes of being an offer
2 of proof as to what would have been said had the Court not
3 sustained the objection.

4 THE COURT: I'll recognize that that's what
5 the offer of proof is.

6 MR. WARE: Right. And I'm reoffering it
7 now for all purposes.

8 THE COURT: Okay. Anything --

9 MR. BRAGG: Well, I guess to the degree
10 that he's offering it now to become a part of the record
11 as testimony and evidence to be considered by Your Honor,
12 we would object to that.

13 THE COURT: I'm going to sustain the
14 objection at this time, but you made your bill.

15 MR. WARE: Thank you.

16 THE COURT: Thank you.

17 Okay. Now this time is there further need
18 for Mr. Moore?

19 MR. BRAGG: No, Your Honor.

20 MR. WARE: No, Your Honor.

21 THE COURT: Thank you. You may go about
22 your way.

23 THE WITNESS: Thank you.

24 THE COURT: Good to see you.

25 (Witness leaves courtroom)

1 MR. WARE: Your Honor, we call Cory
2 Session.

3 THE COURT: Cory Session.

4 (Witness enters courtroom)

5 THE COURT: I believe, sir, you were in the
6 courtroom and sworn in as a witness yesterday; is that
7 right?

8 THE WITNESS: Yes, sir.

9 THE COURT: Of course, you understand
10 you're still under oath.

11 THE WITNESS: Yes, sir.

12 THE COURT: You may be seated. Make
13 yourself comfortable.

14 Mr. Ware, you may proceed.

15 MR. WARE: Thank you, Your Honor.

16 CORY SESSION,
17 having been previously duly sworn, testified as follows:

18 DIRECT EXAMINATION

19 BY MR. WARE:

20 Q. Would you state your name, please.

21 A. It's Cory DeWitt Session, Sr.

22 Q. Cory, you live here in Fort Worth?

23 A. Yes.

24 Q. Okay. And where do you work?

25 A. I work for Frank Kent Motors.

1 Q. Okay. And, Cory, you and I, without going into
2 everything, you and I have known each other for a long
3 time, correct?

4 A. Yes.

5 Q. I -- I'm involved with the Innocence Project of
6 Texas. You're on the board of directors of the Innocence
7 Project of Texas; is that correct?

8 A. Yes, that is correct.

9 Q. Just cutting to the chase, tell us about how you
10 became involved in the case of the Jonas Cherry capital
11 murder?

12 A. I've known the Cherrys for a few years.

13 Q. And you're talking about Glenn and Judith?

14 A. Yes. I've known Glenn and Judith Cherry for a
15 few years.

16 Q. How do you know?

17 A. They purchased, I believe, four automobiles from
18 me.

19 Q. You sell cars at Frank Kent?

20 A. Yes, uh-huh.

21 Q. And so did that relationship kind of involve --
22 or evolve into a friendship, something more than just --

23 A. Yes, uh-huh, yes, it did.

24 Q. Tell us, just briefly, tell us about that a
25 little bit.

1 A. I -- just by chance I was the person who talked
2 to Glenn Cherry when he came to our dealership and --

3 Q. Would that have been, what, back in 2012 or so?

4 A. Around 2012, I'm not sure of the month, but it
5 was in 2012 when we first met. And later on that same day
6 I met his wife. They both liked the vehicle. They agreed
7 to purchase it. And just things that were happening in
8 the media with -- in relations to me, they had read some
9 articles and things, and that's how our relationship
10 became about talking about criminal justice. And they
11 later told me about their son who was murdered at the
12 Putt-Putt in Hurst.

13 Q. And your brother is Tim Cole, correct?

14 A. Yes, my oldest brother.

15 Q. He's -- he was a completely innocent person that
16 was falsely prosecuted by the State of Texas and later
17 exonerated after he died in prison; is that correct?

18 A. Yes. He's our nation's first posthumous DNA
19 exoneree and our first posthumous pardon in Texas.

20 Q. And actually, that's kind of what started
21 y'all's conversation is Mr. Cherry, as you recall,
22 Mr. Cherry brought up he had read something about that in
23 the newspaper, not even knowing that was your brother?

24 A. Correct. He made a comment about a gentleman,
25 he said, well, there was a story about a man that's from

1 here in Fort Worth who died in prison, you know, and he
2 didn't do anything. I said, well, that was my brother.
3 He said what? I said, that's my oldest brother.

4 Q. And then at some point he shared with you that
5 his son had been murdered?

6 A. Yes.

7 Q. And you were familiar with that case?

8 A. Yes. He shared with me about his son -- their
9 son being murdered at the Putt-Putt. And I said, wait a
10 minute, I remember that. I was actually working in
11 Grapevine at that time, and I remember driving by seeing
12 all the police cars out there. And I didn't know what
13 happened until later on that night I got home and saw it
14 on the news.

15 Q. Okay. But over the years y'all -- like I said,
16 the friendship kind of evolved. You sold them cars,
17 talked cars, and he would come by just to shoot the breeze
18 with you sometimes; is that correct?

19 A. Correct, yes.

20 Q. Okay. Did there come a time within the last
21 year that he brought up the -- his son's murder and the
22 impending execution date of Paul Storey?

23 A. Yes, it was. It was December 20th, 2016,
24 Mr. Cherry was at the dealership and he was having his car
25 serviced. And he happened to come into the showroom, and

1 I greeted him like normal. And the conversation
2 immediately went to, well -- I'm paraphrasing a little
3 bit. To the best of my knowledge he said, well, we got
4 the letter, you know, they set the date for -- and he
5 goes, you know, the guy who killed our son, they set the
6 date for his execution.

7 I said, yeah, I had read about that in the
8 paper. I think it had been October that they had set a
9 date. And he said, well, Judy and I wanted to know if --
10 thought you might be able to help us on something.

11 And then he said, they want us to come down
12 -- want to know if we want to view the execution. And I
13 said, in my head I was thinking, well, I don't want to go
14 down there and do it for you. I was just thinking that.

15 And he said, well, we don't want to see him
16 executed -- no. We don't want to see him put to death.
17 And I said okay. So what you're saying is you've never
18 wanted -- you don't want him put to death? I said, did
19 you tell this to the prosecution at the time of the trial?
20 Did they know that?

21 And he said, well, yeah, they -- but they
22 just -- we told them that before the trial, but everything
23 just kind of went over our head with them. And I was
24 like, oh, okay. Well, I'm not sure what we can do, but I
25 know a couple of people and -- but I promise you, you're

1 going to have to write a letter.

2 And that was -- and I didn't -- I made a
3 phone call to someone down in Austin, Kristin Houle with
4 the Texas Coalition to Abolish the Death Penalty and got a
5 voice mail. No return call, because it was the holiday
6 season. And then the first of January came, around the
7 third, fourth, somewhere of that of 2017, and another
8 young lady called me with a company called Taylor
9 Collectives, who had done some work for the Innocence
10 Project. And she said, hey, Cory, do y'all have anybody
11 down here in the legislature that could go on Fox News at
12 3:00 o'clock live to talk about the death penalty, the
13 cocktail, the administering of it? And I said, no, we
14 don't have anyone there until the session starts. I said,
15 but I do know somebody I can probably put you in contact
16 with.

17 So I immediately called Kristin Houle with
18 the Texas Coalition to Abolish the Death Penalty. I
19 called her back, and she actually answered the phone
20 herself, and told her what I needed. And she said, sure,
21 we have someone. And I gave the information of who she --
22 she said, oh, by the way -- this was probably ten minutes
23 into the conversation. We were talking about upcoming
24 criminal justice legislation.

25 She said, oh, by the way, I got your

1 message, I just didn't have time to call you back, we've
2 been out, about Paul Storey. I said, oh, okay. She says,
3 is Mike Ware still representing Paul Storey? And I was
4 surprised because I didn't know Mike was representing --

5 Q. I really don't do death penalty cases.

6 A. Exactly. As far as I know. And I was like
7 sure, I guess. And we talked about it and -- just a
8 little bit.

9 And then I think I called you right there
10 that day, and you called me back -- or I can't remember.
11 But we had a conversation and I said to Mike Ware, I said,
12 hey -- you said, I -- yeah, I'm representing Paul Storey.
13 Actually, the case was given to me because his original
14 appellate attorney had passed away. I said, oh, okay.

15 I said, well, I know the parents of the
16 gentleman who was killed, and they don't want to see him
17 executed. And Mike Ware, he said, you mean the parents of
18 Paul Storey, you know them? I said, no, no, no, no. I
19 know -- and I said it real slow. I said, I know the
20 parents of Jonas Cherry, and they said they do not want to
21 see him executed.

22 And Mike Ware said, you're kidding me. I
23 said, no, I know them. And Mike said, well, I'm going to
24 have to call you back. I believe you were at a training
25 or something, I'm not sure at that time. And I think we

1 talked the next day about how to proceed forward. And I
2 put you in contact, I gave you their phone numbers.

3 Q. And you gave me their -- with their permission,
4 you gave me their contact information?

5 A. Yes, I called Mr. Cherry. I told you and I
6 called Mr. Cherry, and he called me back and said that --
7 I told him that, hey, I have a gentleman, he's actually
8 Paul Storey's appellate attorney. He's also someone I
9 know. And this is just total coincidence, he's also our
10 executive director. And I said, make no mistake, this is
11 not an innocence case. And he said, okay, well, you know,
12 just have him give us a call. Yeah, go ahead and give him
13 a call.

14 Q. And since that time, you've had further
15 discussions with the Cherrys; is that correct?

16 A. Yes.

17 Q. And it's your understanding that they had
18 always, always been opposed to the death penalty?

19 MR. BRAGG: Objection. At this point, Your
20 Honor, that's going to be something the Cherrys -- they're
21 going to be called as witnesses, they're going to be able
22 to testify to what their feelings have always been or not
23 always been, whatever.

24 THE COURT: Any response to that?

25 MR. WARE: I think it's very relevant to

1 this case, Your Honor.

2 THE COURT: Well, you pointed out that
3 they're going to testify.

4 MR. WARE: Yes, sir.

5 MR. BRAGG: So the best evidence of this is
6 going to be asking the Cherrys who have personal knowledge
7 of it.

8 MR. WARE: I'll move on, Your Honor.

9 THE COURT: All right.

10 Q. (BY MR. WARE) You went with -- or you met with
11 the Cherrys down at the Board of Pardons and Paroles, did
12 you not?

13 A. Yes, I did. I -- we had asked them to make a --
14 write a letter, and then we later asked them to do a
15 video. And I said, if you make a video --

16 Q. They were very willing?

17 A. They were willing, yeah, they were willing to do
18 the video. And I said, I'll take this to the governor.
19 And I don't know, someone asked me -- I think it was
20 Dr. Cherry, she said, you can do that? I said yeah. It
21 was just, yeah, I'll take it to him.

22 And I got in contact with a friend of mine
23 who is with the governor most of the time, and he told me
24 where I needed to -- who to talk to first. And I talked
25 to someone in his clemency division, and she said, could

1 you bring it down here? And I said yeah. I took it down
2 there to her and explained to her their opinion and for
3 the time, the years that I've known them, they've always
4 been against the death penalty, and this is something that
5 they did not want.

6 And she asked me, well, where is the
7 appellate process? I believe all of his appeals have
8 exhausted. We just conversed back and forth. I said, has
9 he seen it yet? She never confirmed.

10 Q. Did y'all meet with the chair or the president
11 of the Board of Pardons and Paroles?

12 A. Yes. They drove down, I drove down, separate
13 vehicles. We went to meet with the chairman of the Board
14 of Pardons and Paroles. I forget the other board member
15 who was there, and Ms. Betty Wells, who I know also. She
16 is the general counsel for the Board of Pardons and
17 Paroles. And we met with them. Betty Wells was taking
18 some handwritten notes, and we were sitting in there. And
19 the Cherrys read --

20 Q. Told their version?

21 A. Yeah.

22 Q. They've always been against the death penalty?

23 A. Correct. And the chairman asked Dr. -- asked
24 Glenn what -- if he had anything to say, and Mr. Cherry
25 said --

1 MR. BRAGG: Your Honor, at this point,
2 object again, we're getting into hearsay. It's
3 information that the Cherrys can testify to much better,
4 much more accurately.

5 THE WITNESS: I was present at that
6 meeting.

7 THE COURT: I understand. I'm going to
8 sustain the objection.

9 MR. WARE: Okay. Thank you, Your Honor.
10 Thank you, Mr. Session.
11 We'll pass the witness.

12 THE COURT: All right. State may
13 cross-examine.

14 MR. BRAGG: No questions, Your Honor.

15 THE COURT: All right. Any further need of
16 Mr. Session?

17 MR. BRAGG: No, Your Honor.

18 MR. WARE: No, Your Honor.

19 THE COURT: Thank you, sir. You may go
20 about your way.

21 MR. WARE: Your Honor, if we could take a
22 short break at this time.

23 THE COURT: Okay. It's about 2:05, so
24 we'll take a very short break.

25 (Recess)

1 (Open court, defendant present)

2 THE COURT: All right. We're back on the
3 record. Both sides ready to continue?

4 MR. WARE: Yes, Your Honor.

5 MR. BRAGG: Yes, Your Honor.

6 THE COURT: You may call your next witness.

7 MR. WARE: Thank you, Your Honor. We call
8 Glenn Cherry.

9 (Witness enters courtroom)

10 THE COURT: Thank you, sir. You may step
11 up this way. Mr. Cherry, I believe you were in the
12 courtroom -- go ahead and step around this way. I believe
13 you were in the courtroom yesterday when everybody was
14 placed under oath, so you were sworn in at that time?

15 THE WITNESS: Yes.

16 THE COURT: So you understand you're still
17 under oath?

18 THE WITNESS: Yes, sir.

19 THE COURT: You may be seated. We don't
20 have the microphone on, but just speak up so everyone may
21 hear you.

22

23

24

25

1 GLENN RAY CHERRY,
2 having been previously duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 BY MR. WARE:

5 Q. Mr. Cherry, would you state your name, please.

6 A. Glenn Ray Cherry.

7 Q. And, Mr. Cherry, are you currently retired?

8 A. Yes.

9 Q. And you -- you had a career as a nurse; is that
10 correct?

11 A. Well, a nurse and social worker too.

12 Q. I'm sorry?

13 A. A nurse and social worker too.

14 Q. Okay. And how long have you been retired?

15 A. About five years, I believe.

16 Q. Okay. And you're married to Dr. Judith Cherry;
17 is that correct?

18 A. Yes.

19 Q. And she is -- she's a psychiatrist?

20 A. Yes.

21 Q. At the women's prison out at Carswell, what we
22 call Carswell medical center?

23 A. Yes, sir.

24 Q. Y'all have been married for?

25 A. Thirty-nine years.

1 Q. Thirty-nine years. And y'all had one son?

2 A. Yes.

3 Q. One child. And that was Jonas Cherry?

4 A. Yes, sir.

5 Q. Now, Cory Session has testified as to how you
6 and I met. But just to briefly recap, he's the one that
7 basically introduced us; is that correct?

8 A. Yes, that's right.

9 Q. And that was in response to a request from you
10 maybe at some point late last year in December about a
11 situation that you wanted some help with?

12 A. Well, I -- I was concerned about Mr. Storey
13 getting executed. I didn't want that to happen.

14 And I also didn't want to -- well, when all
15 this started, everybody was all -- the family was going to
16 go down there for it and everybody decided they didn't
17 want to see that. And I didn't either, but I felt like
18 someone from the family should be there.

19 Q. Okay. And --

20 A. So that was the dilemma when I was talking to
21 Cory.

22 Q. Okay. And anyway, you gave him permission to
23 give me your contact information?

24 A. Yes, sir.

25 Q. Okay. And knowing that I was Paul Storey's

1 attorney?

2 A. Yes.

3 Q. And we did -- I did get in contact with y'all,
4 and we actually met mid-January of this year, I guess.
5 Does that sound right?

6 A. Sounds about right. I can't remember. I know
7 it was after the first of the year, I believe.

8 Q. Okay. And I met with you and Dr. Cherry at
9 y'all's home?

10 A. Yes, sir.

11 Q. Over there close to TCU over there?

12 A. That's true.

13 Q. Okay. And the situation y'all had was that
14 y'all were not only opposed to the execution, y'all had
15 been opposed to Paul Storey getting the death penalty from
16 the beginning, correct?

17 A. That's true.

18 Q. Okay. And so tell me about -- tell me about
19 that, if you will. You -- back in 2006, 2007, 2008, all
20 of this tragedy was going on; is that correct?

21 A. Yes, sir.

22 Q. Okay. And as a result, there were some
23 interactions between you and Dr. Cherry and the district
24 attorney's office; is that correct?

25 A. Well, we met with them about -- I'm not sure

1 exactly. It seems like it was a couple of weeks. It
2 might have been about a month before the trial started.

3 Q. Okay.

4 A. We only had the one meeting that I remember.

5 Q. And by we, who are you including?

6 A. Me and Judy.

7 Q. And --

8 A. Robert Foran was there initially. And before
9 the meeting was over, Christy and Suman and her family
10 came in.

11 Q. And what did y'all express at that meeting, you
12 and Dr. Cherry?

13 A. We told them we were against the death penalty,
14 you know.

15 Q. In general?

16 A. Yes. Yes, sir.

17 Q. And in Paul Storey's case?

18 A. Right. We were against the death penalty for
19 anybody.

20 Q. And the fact that this tragedy involved your son
21 had not changed y'all's position on that?

22 A. No, sir.

23 Q. That was y'all's position before this tragedy?

24 A. Yes.

25 Q. And even now that it had hit home so personally,

1 y'all --

2 A. We're still against the death penalty.

3 Q. -- stuck to your ethical principles?

4 A. Yes, sir.

5 Q. And were you very clear about that?

6 A. Well, we told them that we were against the
7 death penalty.

8 Q. And --

9 A. We were told that Suman, Jonas' wife was
10 considered next of kin, you know.

11 Q. And that y'all's wishes would not be considered?

12 A. Well, they didn't actually use those words. But
13 they said that Suman is the main one and she's for the
14 death penalty and we think it's going to be a death
15 penalty case, that's what it's looking like. So that's --

16 Q. And they were the authorities?

17 A. Well, yeah, they were the judicial system from
18 my point of view, still are. You know, you've got to
19 have --

20 Q. And so did -- did you -- I mean, did you meet
21 with them after that?

22 A. No.

23 Q. That you recall?

24 A. I don't remember. I don't remember that. Well,
25 we had a little conversation at one point, maybe it was

1 after the trial started, about if you need something,
2 holler at us; if there's something they're describing that
3 you don't need to hear, we'll ask you if you want to go
4 outside until that particular part's over. But that's all
5 I remember as far as actually meeting with them.

6 Q. And just to be clear, you and Judith, your wife
7 were very much for Paul Storey being prosecuted?

8 A. Oh, sure. Sure. Yeah.

9 Q. And you're very much in favor of him getting
10 life without any possibility of parole?

11 A. That's what -- yeah.

12 Q. And to that extent, you were very grateful for
13 the prosecutors and the criminal justice system --

14 A. Yeah.

15 Q. -- in prosecuting?

16 A. I believe they did a good job.

17 Q. But you were also clear that you were -- you and
18 Judith were very much against the death penalty?

19 A. We told them that, yes, sir.

20 Q. Okay. Did you ever tell them anything
21 different? Did you ever tell them that you were changing
22 your mind on that?

23 A. I never told them that because we didn't change
24 our mind and they never asked.

25 Q. So your views on that never changed?

1 A. No, sir.

2 Q. To this day?

3 A. That's right.

4 Q. Really, there was no -- even if they had
5 changed, there was never an opportunity for you to tell
6 them that your views had changed?

7 A. We never discussed it after that initial time
8 when we told them we was against the death penalty, and
9 they acknowledged that and said it was -- Suman was the
10 next of kin, and they thought it was going to be a capital
11 murder case. And that was it.

12 Q. And so they didn't -- they didn't need to hear
13 any more about y'all being against the death penalty?

14 A. I guess not. Nobody ever asked us anything
15 about it.

16 Q. Did they ever tell -- do you recall them ever
17 telling you and Judith that they were going to offer Paul
18 Storey a life sentence?

19 A. No.

20 Q. When is the first time you heard that they'd
21 offered Paul Storey a life sentence?

22 A. When I talked to you, whenever that first
23 meeting was.

24 Q. Mr. Cherry, do you remember reading a newspaper
25 article in the Star-Telegram on about April the 2nd of

1 this year?

2 A. Well, I read a lot of articles, and I read most
3 of them that were in the paper. I do get the paper.

4 Q. And this particular one attributed Christy Jack
5 with saying, Cherry's mother and father did not want
6 Storey to receive the death penalty in the beginning, Jack
7 said. But once Storey rejected the prosecutor's offer of
8 life in prison without parole, the family supported the
9 decision to pursue the death penalty, Jack said. Is that
10 true of you and Judith?

11 A. No, it's not.

12 Q. When y'all read that, did that frankly kind of
13 offend you?

14 A. Well, it was surprising since we didn't -- that
15 wasn't our opinion. And, once again, we were never asked
16 if we changed our opinion, which we didn't change our
17 opinion.

18 Q. Now, after -- after Paul Storey received the
19 death penalty -- and y'all were there for most of the
20 trial; is that correct?

21 A. Yes, sir.

22 Q. Now, there were victims assistance people that
23 were attending to y'all; is that correct?

24 A. Yes.

25 Q. And there were a couple of witnesses when they

1 suggested that y'all actually leave the courtroom?

2 A. Yeah.

3 Q. I think maybe when the medical examiner
4 testified?

5 A. Yeah, that's true. We went out a couple of
6 times.

7 Q. And everybody was very kind to you?

8 A. Oh, yeah. I felt like they were -- did a good
9 job.

10 Q. I mean, there's no question here that y'all were
11 mistreated?

12 A. Oh, no, no.

13 Q. And everything seemed professional to you?

14 A. Yes.

15 Q. And you were grateful?

16 A. Yes, that's true. Yeah, we want someone to be
17 convicted and held responsible.

18 Q. Do you remember that after the verdict came back
19 where Paul Storey got death, that Mark Porter actually
20 pled to a life sentence?

21 A. Afterwards, I think a couple of weeks after or a
22 month or something, yes, sir.

23 Q. Okay. And you and Judith were satisfied with
24 that?

25 A. Oh, yeah.

1 Q. And you would have been satisfied -- well, as a
2 matter of fact, that's what you preferred to be the
3 sentence for Paul Storey?

4 A. Yes.

5 Q. And, I mean, did y'all feel at the time and do
6 you feel now that the execution of Paul Storey is going to
7 cause y'all even further pain?

8 A. Probably, yeah.

9 Q. And likewise, y'all are against the death
10 penalty in general. But do you also -- having felt what
11 it's like to go through the death of a child, that's not
12 something you would wish on anybody else?

13 A. No, no, it's not.

14 Q. Including Paul Storey's mother Marilyn Shankle?

15 A. That's true.

16 Q. Now, had you been called as a witness in that
17 case and asked these same questions, basically these same
18 questions to the jury, would your answers have been the
19 same?

20 A. Yes.

21 MR. WARE: Thank you, Mr. Cherry.

22 I pass the witness.

23 THE COURT: The State may cross-examine.

24 MR. BRAGG: Thank you, Your Honor.

25

1 CROSS-EXAMINATION

2 BY MR. BRAGG:

3 Q. Good afternoon, Mr. Cherry.

4 A. Hello.

5 Q. So to clarify, I want to make sure we're being
6 clear here. Your position regarding the death penalty,
7 that's a general opposition?

8 A. Yes, I'm against the death penalty.

9 Q. So that position formed before this terrible set
10 of circumstances, correct?

11 A. Yes.

12 Q. And your opposition to the death penalty would
13 be to any -- to anybody being executed?14 A. I don't believe in the death penalty for
15 anybody.16 Q. And they asked you about Mr. Storey's mother,
17 about your feelings about that. But that would be for any
18 mother that was going to lose a son, you know, to
19 execution, correct?20 A. Yeah, I don't want anybody to have to go through
21 that.22 Q. Have you spoken with friends and family about
23 your views on the death penalty?

24 A. Well, I know most of my family's views, I think.

25 Q. But, I mean, have you told them your views?

1 A. Yeah, it's not a secret.

2 Q. Yeah. And certainly you've told friends?

3 A. Yeah, anybody that wants to know or has ever
4 asked me or we've ever talked about it. I don't just go
5 around telling everybody all my views.

6 Q. Sure. So before trial you said that you had a
7 meeting where it was you and your wife and Robert in the
8 room first?

9 A. Yes, sir.

10 Q. And then you were waiting for Christy and Suman
11 to come in, correct?

12 A. Well, I think we told them how we felt. I told
13 Robert how we felt, I think, before Christy and Suman come
14 in. Or we were talking about it as they came in, I'm not
15 sure which, but it was -- it seemed like it was just me
16 and Judy and Robert Foran. But they came in shortly
17 afterwards.

18 Q. So -- and it was your testimony, I believe, that
19 this occurred a couple of weeks before trial?

20 A. Sometime before the trial. It might have been a
21 month, but it was our initial meeting with them.

22 Q. Okay. And so you say a month, I do believe you
23 said either a month or a couple of weeks, but sometime
24 before trial but within that timeframe --

25 A. Yes.

1 Q. -- is your recollection of this meeting?

2 A. Yes, I remember.

3 Q. And that was the meeting where -- you said this
4 is your initial meeting with the prosecutors?

5 A. Yes.

6 Q. Okay. And that was when they told you, Robert
7 or Christy, someone told you that because Suman was the
8 widow, that her opinion would be considered as next of
9 kin, her opinion on the death penalty would be considered
10 next of kin, correct?

11 A. Yes.

12 Q. That that would be considered when making the
13 decision about whether or not to go for the death penalty?
14 Is that your understanding?

15 A. Well, they just said her, since she was next of
16 kin, that would get more weight, something like that. I
17 don't know exactly how they said it. But they let us know
18 that her feelings would be taken above ours or first or
19 however you want to call it.

20 Q. When making the decision whether or not to go
21 with the death penalty?

22 A. Yes.

23 Q. Can you describe your -- well, let me ask you
24 this. So during the trial, did you talk with the
25 prosecutors at all?

1 A. I mean, they'd ask us if we needed something or
2 before someone would testify, maybe the -- something that
3 we didn't want to see or they didn't think we should see,
4 they'd tell us, this is coming up, maybe you want to take
5 a break or something. But stuff like that, nothing real
6 formal.

7 Q. Where exactly -- on what row were you sitting
8 during the trial?

9 I mean, were you sitting on the first row
10 or --

11 A. Oh, about halfway -- we weren't on the first
12 row. We was on about the third row, I suspect.

13 Q. And you were sitting behind the prosecutors?

14 A. Right, yeah.

15 Q. Was there a particular person that you spoke
16 with? I mean, was it Christy that would come talk to you?
17 Was it Robert that would come talk to you?

18 A. Oh, I think it was more Robert, but it seemed
19 like there was some kind of assistant there too maybe that
20 run interference. But like I said, most of it was just in
21 regards to do you want to hear this or don't, or maybe you
22 should leave or -- while this is being done.

23 Q. You -- you sat through almost all the trial, and
24 you testified on direct just now that there were a couple
25 of times where you left for purposes of a witness. But

1 for the most part you were in there for trial?

2 A. Yes, sir.

3 Q. Okay. During the punishment, were you there?
4 The punishment phase after they found him guilty?

5 A. Yes.

6 Q. Did you sit through when Suman testified?

7 A. I think I was there, but I don't have a real
8 clear -- yeah, I was there.

9 Q. But you don't have a clear recollection of the
10 testimony?

11 A. Not really.

12 Q. Okay. Do you recall generally a feeling about
13 the testimony? Do you recall it being emotional?
14 Powerful? Do you recall it lasting for a while or for it
15 being very short? Do you have any kind of general sense
16 of it?

17 A. You mean Suman's conversation?

18 Q. Suman's testimony, yes, sir.

19 A. No, I don't remember. I don't think she was up
20 there too long.

21 Q. Did you sit through the closing arguments?

22 A. Yes.

23 Q. Actually before closing arguments, let me ask
24 you, do you recall any of the witnesses that testified on
25 Mr. Storey's behalf?

1 A. I think his stepfather said something nice, you
2 know, he's a nice guy. And his father testified. And
3 that's about all I remember. Oh, his brother testified, I
4 believe.

5 Q. Do you recall that his mother testified?

6 A. I think she did, yes, sir.

7 Q. Do you recall anything about that testimony?

8 A. Not much really.

9 Q. So you -- and just to go back to what I
10 previously asked you. You were sitting there, you were in
11 the courtroom for the closing arguments?

12 A. Yeah, I was there, yes, sir.

13 Q. You know the statement at issue that we're
14 talking about that Ms. Jack made during closing arguments?

15 A. Yes.

16 Q. Okay. Let me refresh your memory just to make
17 sure we're on the same page. She said: It should go
18 without saying that all of Jonas' family and everyone who
19 loved him believe the death penalty was appropriate. Do
20 you recall hearing that statement?

21 A. No.

22 Q. You don't?

23 A. No.

24 Q. Do you recall -- so after the testimony -- after
25 the testimony, after punishment -- excuse me. After the

1 arguments are given and the jury goes back in the back
2 room to deliberate, do you recall speaking with Ms. Jack
3 or Mr. Foran at that point?

4 A. No, not really.

5 Q. Okay.

6 A. No, sir.

7 Q. After the jury came back and returned the
8 verdict saying there was the death penalty -- or giving
9 him the death penalty, do you recall speaking with Christy
10 or Robert at that point?

11 A. No. I mean, no, sir.

12 Q. Okay. You certainly were aware -- you certainly
13 were aware going into trial that they were seeking the
14 death penalty, that they were going to ask the jury for
15 the death penalty?

16 A. They indicated that based on the evidence they
17 had, that it looked like it was going to be -- they were
18 going to go for the death penalty.

19 Q. Did you send the -- you and your wife, did y'all
20 send the prosecutors a card after the trial?

21 A. Yes.

22 MR. BRAGG: Your Honor, may I approach?

23 THE COURT: Very well.

24 Q. (BY MR. BRAGG) I'm showing you State's
25 Exhibit 1, what's been preadmitted as State's Exhibit 1.

1 If you could just look through that. It's the envelope
2 and the -- if you turn the page there.

3 Is that the card that you and your wife
4 sent?

5 A. Yes. It looks like my wife's hand-scratching.

6 Q. So your wife did write that?

7 A. Yes.

8 Q. This question probably goes without saying, but
9 I would like to get on the record. This was a very
10 emotional trial for you?

11 A. Yes, sir.

12 Q. It was very -- I just can't even imagine.

13 A. Kind of like a bad nightmare, but yes, sir.

14 MR. BRAGG: Pass the witness, Your Honor.

15 THE COURT: Any other questions?

16 REDIRECT EXAMINATION

17 BY MR. WARE:

18 Q. Mr. Cherry, at any point during the trial or
19 during the punishment hearing, did you ever, ever approach
20 Robert Foran or Christy Jack and offer to testify in favor
21 of Paul Storey receiving the death penalty?

22 A. No.

23 Q. You didn't do that?

24 A. No.

25 Q. And you wouldn't have done that?

1 A. No.

2 Q. The card y'all sent, y'all were genuinely
3 appreciative, were you not?

4 A. That's true.

5 Q. But that card was sent, what, several weeks
6 later after -- after Mark Porter had pled, etcetera?

7 A. I don't know exactly the timeframe. I know it
8 was several weeks -- several weeks after the end of the
9 trial.

10 Q. Okay. I mean, the card itself, it's all
11 blurred, you can't read the date on it. But that's your
12 recollection is it was --

13 A. I believe it was after -- it was after the
14 trial, yeah.

15 Q. But even after Mark Porter had pled?

16 A. I'm not sure about that.

17 Q. Okay.

18 A. I don't know how long it was before Mark was --
19 I think it was -- anyway.

20 MR. WARE: Thank you, Mr. Cherry.

21 I'll pass the witness.

22 THE COURT: Do you have questions from the
23 State?

24 MR. BRAGG: No, Your Honor.

25 THE COURT: All right. Thank you, sir.

1 You may step down at this time.

2 (Witness leaves courtroom)

3 MR. WARE: Call Judith Cherry.

4 THE COURT: Judith Cherry.

5 (Witness enters courtroom)

6 THE COURT: Mrs. Cherry, I believe you were
7 present in the courtroom yesterday when everyone was sworn
8 in?

9 THE WITNESS: Yes, I was.

10 THE COURT: So you recall you've been
11 placed under oath.

12 THE WITNESS: Yes, sir.

13 THE COURT: You understand you're still
14 under oath. You may be seated and make yourself
15 comfortable.

16 Mr. Ware, you may proceed.

17 MR. WARE: Thank you, Your Honor.

18 JUDITH CHERRY,
19 having been previously duly sworn, testified as follows:

20 DIRECT EXAMINATION

21 BY MR. WARE:

22 Q. Dr. Cherry, would you state your name, please.

23 A. Judith Cherry.

24 Q. And it's Dr. Cherry, is it not?

25 A. Yes.

1 Q. And, Dr. Cherry, what do you do for a living?

2 A. I'm the chief psychiatrist at Federal Medical
3 Center, Carswell, which is a women's federal prison.

4 Q. That's here in Fort Worth?

5 A. That's correct.

6 Q. And how long have you held that position?

7 A. Sixteen years.

8 Q. And you -- you're married to Glenn Cherry who
9 testified right before you're testifying; is that correct?

10 A. That's correct.

11 Q. And how long have y'all been married?

12 A. Thirty-nine years.

13 Q. Going -- I mean, you know why we're here today,
14 correct?

15 A. (Moving head up and down).

16 Q. And I apologize that we have to revisit these
17 painful times. But the thing is these are still painful
18 times, are they not?

19 A. They are.

20 Q. But back in 2006, your only child, 28-year-old
21 Jonas Cherry was murdered; is that correct?

22 A. That's correct.

23 Q. And certainly to the extent that y'all could,
24 you and your husband Glenn completely cooperated with law
25 enforcement, completely cooperated with the prosecutors'

1 office and such; is that correct?

2 A. That's correct.

3 Q. You wanted to see the men who committed this
4 horrible act duly handled by the criminal justice system;
5 is that correct?

6 A. That's correct.

7 Q. Now, with that said, what are your feelings
8 about the death penalty?

9 A. I'm against the death penalty. And I'm against
10 the death penalty in our judicial system for anyone. And
11 in particular Paul Storey, I do not want him to be
12 executed.

13 Q. And have you -- have you always felt that way?

14 A. Ever since I can remember. I mean, I don't ever
15 -- I have no memory of ever wrestling with myself over the
16 death penalty. I've always thought it was wrong.

17 Q. And certainly, at least you had these ethical
18 beliefs, these spiritual beliefs prior to the time that
19 your son was murdered?

20 A. That's correct.

21 Q. And even when it all became so personal, you
22 still held on to these feelings and beliefs that you had
23 long had about the death penalty?

24 A. Yes, we did. And it was very important to me at
25 that time when this horrible thing happened not to change

1 my values based on what happened to us.

2 Q. Did -- did there come a time when you and your
3 husband Glenn met with the district attorney's office?

4 A. Yes.

5 Q. Can you tell me about that? Do you know about
6 when that was?

7 A. I don't recall exactly, but I think it was about
8 around three weeks before the trial started. And we met
9 with Robert Foran first. He was the first person we met
10 with. And then Christy Jack came in later, as I recall.
11 And he was telling us about the case. And we told him
12 that -- that we were against the death penalty, that we
13 didn't want that.

14 And it was explained to us that this, by
15 the merits of the case, this was a capital murder case and
16 also that our daughter-in-law Suman was for the death
17 penalty. And he had already been meeting with her. She
18 was involved before we were. And he said that -- that her
19 opinion carried more weight than ours did since she was
20 the next of kin.

21 Q. Is it fair to say that in all likelihood Suman
22 had already apprised them about y'all's feelings about the
23 death penalty?

24 A. I think she probably did, but I've never asked
25 her.

1 Q. Okay. But this was not necessarily the first
2 time they'd heard that, it's just the first time they
3 heard that from y'all?

4 A. Perhaps, I don't know.

5 Q. Did you ever have -- did you or Glenn ever have
6 another conversation with the prosecutors, Christy Jack or
7 Robert Foran, about your feelings about the death penalty
8 or was it just that one time?

9 A. As far as I remember it was that one time. But,
10 I mean, we never changed our mind. But I don't recall
11 having another conversation with them.

12 Q. Okay. And you definitely, either one of y'all
13 definitely never had another conversation with them in
14 which you stated that you had changed your mind in some
15 way?

16 A. That's -- we would never say that we changed our
17 mind. That didn't happen.

18 Q. In fact, you never changed your mind?

19 A. That's correct. We never changed our mind.

20 Q. Do you remember reading in the Star-Telegram
21 Christy Jack saying: Cherry's mother and father did not
22 want Storey to receive the death penalty in the beginning,
23 Jack said. But once Storey rejected the prosecution's
24 offer of life in prison without parole, the family
25 supported the decision to pursue the death penalty, Jack

1 said. That's definitely not true of you or Glenn; is that
2 true?

3 A. It's not true of me or Glenn.

4 Q. And do you recall ever even being told that Paul
5 Storey had been offered a life sentence?

6 A. I don't recall being told that.

7 Q. Or any discussions with the prosecutor
8 surrounding that?

9 A. I do not recall that.

10 Q. Do you recall that after Paul -- after the
11 verdict came back, that at some point Mark Porter, the
12 co-defendant, pled to life without the possibility of
13 parole?

14 A. I do recall that, yes.

15 Q. And y'all were satisfied with that?

16 A. That's correct.

17 Q. And really that's what y'all wanted to see for
18 Paul Storey?

19 A. Yes.

20 Q. And do today?

21 A. Yes, that's correct.

22 Q. And had you been called to the stand to testify
23 in the punishment hearing, would your answers to my
24 questions have been the same back then as they are now?

25 A. They would, yes.

1 MR. WARE: Thank you.

2 I'll pass the witness.

3 THE COURT: The State may cross-examine.

4 MR. BRAGG: Thank you, Your Honor.

5 CROSS-EXAMINATION

6 BY MR. BRAGG:

7 Q. Good afternoon, Dr. Cherry.

8 A. Good afternoon.

9 Q. So to clarify, you are generally opposed to the
10 death penalty?

11 A. I'm opposed to the death penalty, uh-huh.

12 Q. Right. You developed this belief before these
13 terrible circumstances came about?

14 A. That's correct.

15 Q. And you certainly voiced that you don't want
16 Paul Storey to die, correct?

17 A. That's right.

18 Q. But you wouldn't want anybody to be executed
19 under the death penalty?

20 A. Right.

21 Q. And you've spoken to other family members about
22 this view?

23 A. Yes.

24 Q. You've spoken to your friends about this view?

25 A. Yes.

1 Q. So you testified on direct about the
2 conversation with -- where you and Robert and your husband
3 were there, and Christy and Suman were coming in. Was
4 this the only time that you met with the prosecutors
5 before trial?

6 A. I don't recall. I know we talked to them at
7 other times, and it may have been -- I really don't
8 remember exactly when it was. But it may have been the
9 only time we talked to them before the trial. During the
10 trial we talked to them several times.

11 Q. Okay. And during the trial when you talked to
12 them several times, was there a particular attorney you
13 would always speak with?

14 A. No, either one. And it was usually warnings to
15 us about some testimony that was going to be particularly
16 painful for the family members and to suggest that we not
17 observe those proceedings, things like that.

18 Q. And where did y'all sit during the trial?

19 A. Just --

20 Q. Did you sit behind the prosecutors?

21 A. I don't remember where we sat. I mean, just --
22 just -- I don't know.

23 Q. Okay. But leading up to the trial, I believe
24 you said on direct you were unaware, you did not know --
25 well, let me ask you this.

1 Is it your testimony that you absolutely
2 did not know that there was a life sentence offered to
3 Paul Storey or you just don't recall that?

4 A. Ask me again. I don't know if I understand the
5 question.

6 Q. Well, so you said that you did not recall that
7 Paul Storey had been offered a life sentence leading up to
8 trial.

9 A. Uh-huh.

10 Q. Is that correct?

11 A. That's correct.

12 Q. So my question is, is it your testimony that you
13 absolutely were not told that or that you just simply
14 don't remember being told that?

15 A. If I can't remember something, I don't remember
16 it. So, I mean, that's within the realm of possibility,
17 but I do not recall being told that.

18 Q. During the trial, you mentioned you had several
19 conversations with the prosecution. Did those
20 conversations happen in both the guilt portion of trial
21 and the punishment portion?

22 A. I mean, the punishment portion was so small --
23 so short, so the vast majority was in the punishment (sic)
24 phase, and I don't recall conversations with them during
25 the punishment phase, I just don't know.

1 Q. Were you present for the entire portion of the
2 punishment phase?

3 A. Yes.

4 Q. You were there when Suman testified?

5 A. Yes. I don't remember her testimony very well,
6 though.

7 Q. Okay. Do you remember any of the testimony that
8 was on behalf of Mr. Storey?

9 A. Uh-huh.

10 Q. What do you remember about that?

11 A. His mother, his father, just family and friends
12 getting up and talking about him.

13 Q. What did you think of -- let me ask it this way.
14 How do you think the prosecutors did, Christy and Robert
15 in this case?

16 A. We remain and were very grateful that they very
17 competently prosecuted Paul Storey and that he was
18 convicted. That's what we wanted. And we wanted to find
19 out what happened to our son. That was also something of
20 interest to us. We knew that he was killed, but we didn't
21 know the circumstances, and so that was important to us.
22 So we were grateful to them for what they did.

23 Q. How did you feel -- obviously, you learned --
24 unfortunately, you learned a lot about the process of a
25 case going through the guilt and punishment phase.

1 A. Uh-huh.

2 Q. Yes?

3 A. Yes.

4 Q. Did that in any way give you a sense of comfort
5 about the case or a comfort about what was going on?

6 A. I'm not sure what you're asking me.

7 Q. Okay. That's fair. It was probably poorly
8 worded.

9 So let me just ask this. So after the
10 argument during the punishment phase, all the testimony
11 has happened, and then the prosecution and the Defense
12 both make their arguments, and then the jury goes back in
13 deliberations. When the jury is in deliberations, did you
14 talk to the prosecution, the prosecutors at all, or do you
15 recall any conversations with them?

16 A. I don't recall talking to them. I think we were
17 with family at that time.

18 Q. Do you recall any conversations with the
19 prosecutors after the verdict was returned?

20 A. I don't recall any conversations that.

21 Q. Do you recall any conversations with victims
22 assistance coordinators at that time?

23 A. Uh-huh.

24 Q. What were those conversations like?

25 A. Well, after he received the death penalty --

1 well, I mean, we were in contact with them a lot. They
2 had a room where we went to be with family and friends.
3 And they were very helpful.

4 And we had some kid that was -- kind of
5 attached himself to our family that was really disruptive.
6 And they helped get him out of the way for us and just
7 various things like that that were just helpful. And
8 she -- when I wrote my allocution, she was helpful in
9 talking with me about it.

10 Q. Of course, you understand that -- you understand
11 that we're here today because of a particular comment that
12 Christy Jack made in her closing arguments?

13 A. That she said -- oh, that everyone wanted --
14 everyone who loved Jonas wanted the death penalty.

15 Q. Right. Do you recall her making that statement
16 during the closing arguments?

17 A. I don't have a real clear recollection of that.
18 I remember she was very forceful and persuasive, but I
19 don't remember those exact words.

20 Q. Of course, this was -- it was a very stressful
21 time for you?

22 A. Uh-huh.

23 Q. Probably the most stressful time you've ever
24 gone through in your life?

25 A. True.

1 MR. BRAGG: Pass the witness, Your Honor.

2 THE COURT: Any other questions from the
3 Applicant?

4 REDIRECT EXAMINATION

5 BY MR. WARE:

6 Q. Still are stressful times, aren't they?

7 A. Uh-huh. Yes.

8 MR. WARE: We'll pass the witness.

9 THE COURT: Anything else from the State?

10 MR. BRAGG: No, Your Honor.

11 THE COURT: All right. Thank you.

12 MR. WARE: Thank you, Dr. Cherry.

13 THE COURT: You may step down.

14 (Witness leaves courtroom)

15 MR. WARE: Your Honor, may we approach?

16 THE COURT: Yes.

17 (At the Bench, off the record)

18 (Recess)

19 (Open court, defendant present)

20 THE COURT: Let's go ahead and be back on
21 the record. It's 3:30. Are both sides ready to continue
22 at this time?

23 MR. BRAGG: We are, Your Honor.

24 MR. WARE: Yes, Your Honor.

25 THE COURT: I think I spoke with counsel at

1 the bench a minute ago that Dr. and Ms. Storey are in the
2 courtroom --

3 MR. WARE: Cherry.

4 THE COURT: I'm sorry. Dr. and Mrs. Cherry
5 (sic) are in the courtroom, and I believe that's with the
6 agreement of both sides at this point?

7 MR. BRAGG: Yes, Your Honor.

8 MR. WARE: Yes, Your Honor.

9 THE COURT: All right. Thank you.

10 All right. At this time I understand from
11 our conference that the Applicant has no more witnesses
12 today but will have some additional witnesses for a
13 different day?

14 MR. WARE: Yes, sir.

15 MR. HAMPTON: That's right.

16 THE COURT: And the State has at least
17 three witnesses to call today; is that right?

18 MR. BRAGG: Yes, Your Honor.

19 THE COURT: And the State may proceed.

20 MS. PATTON: Respondent would call Leticia
21 Martinez.

22 THE COURT: Ms. Martinez.

23 Just for clarification, I may have said
24 Dr. and Mrs. Cherry, what I meant to say was Dr. and
25 Mr. Cherry. Sorry about that.

1 (Witness enters courtroom)

2 THE COURT: Ms. Martinez, you may step up
3 then.

4 Have you raise your right hand.

5 (Witness sworn)

6 THE COURT: All right. Thank you. You may
7 be seated.

8 LETICIA MARTINEZ,
9 having been first duly sworn, testified as follows:

10 DIRECT EXAMINATION

11 BY MS. PATTON:

12 Q. Ms. Martinez, could you please state your name
13 for the record.

14 A. My name is Leticia Martinez. L-E-T-I-C-I-A,
15 Martinez with a Z.

16 Q. And, Ms. Martinez, what do you do for a living?

17 A. I am a criminal defense attorney here in Fort
18 Worth.

19 Q. And how long -- how long have you been a
20 criminal defense attorney?

21 A. Since January of -- no, actually March of 2015.

22 Q. Okay. And what did you do prior to that?

23 A. I was a prosecutor for the Tarrant County DA's
24 office.

25 Q. And how long did you work for the Tarrant County

1 DA's office?

2 A. For about 20 years.

3 Q. And was that your first job as a licensed
4 attorney?

5 A. Yes, it was.

6 Q. And are you board certified?

7 A. I am.

8 Q. Do you know Christy Jack?

9 A. Yes, I do, very well.

10 Q. How do you know her?

11 A. I worked with her -- I met her at the DA's
12 office. I worked with her out of the 20 years probably 17
13 to 18 of those years. And I practiced closely with her,
14 tried cases with her. And then we left the DA's office
15 early 2015 in close time, and then we joined up together
16 in private practice.

17 Q. And during the time that you worked together at
18 the DA's office, was she, in fact, your supervisor for
19 part of that time?

20 A. For a part of it she was. Not a long part of
21 it, but some part of it, yes.

22 Q. Based upon your knowledge of Ms. Jack for the
23 past 20 years, do you have an opinion as to her
24 truthfulness and credibility?

25 A. I do.

1 Q. And what is that opinion?

2 A. That it's great, absolutely great.

3 MS. PATTON: I'll pass the witness.

4 THE COURT: You may cross-examine the
5 witness at this time.

6 MR. WARE: I've got no questions.

7 THE COURT: All right. Is there further
8 need of the witness then for either side?

9 MS. PATTON: Yes.

10 THE COURT: Further need?

11 MS. PATTON: No, no. I'm sorry. She may
12 be excused as far as we're concerned.

13 THE COURT: Thank you. You may step down.
14 You may go about your way.

15 THE WITNESS: Thanks, Judge.

16 THE COURT: You may call your next witness.

17 (Witness leaves courtroom)

18 MS. PATTON: Judge, we call The Honorable
19 Mollee Westfall.

20 THE COURT: Judge Westfall. She may be
21 back here.

22 (Witness enters courtroom)

23 THE COURT: Judge Westfall, let me just
24 confirm you've received a subpoena in this case?

25 THE WITNESS: I have a subpoena. It's in

1 my hand.

2 THE COURT: Let me have you raise your
3 right hand to be sworn.

4 (Witness sworn)

5 THE COURT: All right. Thank you. You may
6 be seated.

7 You may proceed.

8 MS. PATTON: Thank you, Your Honor.

9 MOLLEE WESTFALL,
10 having been first duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY MS. PATTON:

13 Q. Would you please state your name for the record.

14 A. Mollee Westfall.

15 Q. And, Judge Westfall, how are you employed?

16 A. I'm a district judge.

17 Q. Here in Tarrant County?

18 A. Yes, in the 371st District Court.

19 Q. And how long have you been the district judge
20 here?

21 A. Since 2007.

22 Q. What did you do prior to that?

23 A. I worked at the Tarrant County DA's office.

24 Q. And how long did you work there?

25 A. I started in February of 1996 and I continued

1 until I took the Bench on January 1st, 2007.

2 Q. And during your time at either the DA's office
3 or as a judge, have you had an opportunity to work with
4 Christy Jack?

5 A. I have. She was chief of Criminal District
6 Court No. 1 when I was assigned as a felony prosecutor
7 there early on in my felony career in 1997. And then she
8 was also my chief again in the 213th District Court from
9 2004 through 2006.

10 Q. And have you remained in contact with her even
11 after you have taken the Bench?

12 A. Yes. Besides being coworkers, from the time
13 that she was my chief in 1997, we developed a personal
14 relationship and became friends. We would see each other
15 outside of the office. We've traveled together. She's
16 been to my house, I've been to her house. So we have a
17 personal friendship as well as a professional relationship
18 from the DA's office.

19 Q. And do you have an opinion as to Ms. Jack's
20 truthfulness and credibility?

21 A. I do.

22 Q. And what is that opinion?

23 A. That she is truthful and credible.

24 MS. PATTON: I'll pass the witness.

25 THE COURT: You may cross-examine.

1 MR. HAMPTON: Thank you, Judge.

2 CROSS-EXAMINATION

3 BY MR. HAMPTON:

4 Q. I'm Keith Hampton. And I just realized you're
5 Greg Westfall's wife, and I know Greg very well. And I
6 just bumped into you in the hallway, and I apologize for
7 -- it's I think 20 years, so I look different too.

8 I want to ask you about --

9 A. What does that mean exactly, different?

10 Q. No, no, you look fine. You're like who is this
11 overweight, middle-aged man who's trying to question me.
12 There was a day.

13 No, I want to ask you a little bit about
14 some other lawyers that you may know.

15 A. Okay.

16 Q. And it's really the same character question, if
17 you've got an opinion as to their truthfulness and
18 credibility. Larry Moore?

19 A. Yes, I have an opinion.

20 Q. And what is that?

21 A. That he is truthful and credible.

22 Q. Okay. Mark Daniel?

23 A. Yes, I have an opinion.

24 Q. And?

25 A. He is truthful and credible.

1 Q. And the same series for Tim Moore?

2 A. Tim Moore, yes, he is truthful and credible.

3 Q. And do you remember Bob Ford?

4 A. Yes, very well.

5 Q. Would you -- how would you describe his level of
6 diligence when he is defending a case?

7 A. Extremely zealous.

8 Q. Very zealous. Very diligent?

9 A. Very diligent.

10 MR. HAMPTON: Okay. I'll pass the witness.

11 THE COURT: Any other questions?

12 MS. PATTON: No further questions, Your
13 Honor.

14 THE COURT: All right. Is there further
15 need of Judge Westfall?

16 MS. PATTON: No, Your Honor.

17 MR. HAMPTON: No, Judge.

18 THE COURT: Thank you, Judge.

19 MR. WARE: Thank you, Judge.

20 (Witness leaves courtroom)

21 MR. BRAGG: Well, Judge, despite our best
22 efforts, our third witness is still en route.

23 THE COURT: Okay. That series of witnesses
24 took a total of eight minutes, I think.

25 MR. BRAGG: So we do expect this witness to

1 do the same.

2 THE COURT: All right. Well, why don't we
3 recess for a few minutes then.

4 MR. HAMPTON: Judge, we may be able to --
5 if it's the exact same questions, I think we can stipulate
6 that they're perfectly credible people. I've got no
7 problem with that.

8 THE COURT: Do y'all --

9 MR. OTTOWAY: The person's on their way, so
10 we prefer to have the live testimony.

11 MR. BRAGG: Yeah, especially since we did
12 call the judge to have the judge rush to get up here, we
13 wouldn't want to say, oh, do a U-turn.

14 THE COURT: All right. Well, hopefully, if
15 he's on his way, he'll be here in a few minutes. And
16 he'll be short --

17 MR. HAMPTON: Oh, it's short, yeah.

18 THE COURT: All right. Thank you.

19 (Recess)

20 (Open court, defendant present)

21 THE COURT: All right. Back on the record
22 this afternoon. Both sides ready to continue?

23 MR. BRAGG: We are, Your Honor.

24 MR. WARE: Yes, Your Honor.

25 THE COURT: You may call your next witness.

1 MS. PATTON: Respondent would call The
2 Honorable Jeff Cureton.

3 THE COURT: And you've gotten a subpoena in
4 this case?

5 THE WITNESS: I have.

6 (Witness sworn)

7 THE COURT: Thank you.

8 You may proceed.

9 JEFFREY CURETON,
10 having been first duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY MS. PATTON:

13 Q. Please state your name for the record.

14 A. Jeffrey Cureton.

15 Q. Can you spell that for the court reporter?

16 A. It's C-U-R-E-T-O-N.

17 Q. And how are you employed?

18 A. I am the United States magistrate judge for the
19 Northern District of Texas here in the Fort Worth
20 Division.

21 Q. And how long have you been so employed?

22 A. Since 2010.

23 Q. And what did you do prior to that?

24 A. I was in private practice for several years with
25 Steve Gordon, we were law partners. I was with a civil

1 firm before that for three years, and then two-and-a-half
2 years in the Tarrant County DA's office from '97 to
3 roughly 2000. Law clerk for Judge Mahon, Eldon Mahon here
4 in Fort Worth for two additional stints.

5 Q. And do you know Christy Jack?

6 A. I do.

7 Q. How do you know her?

8 A. I know her both personally and professionally.

9 Q. How long have you known her?

10 A. For over 20 years.

11 Q. And during the course of working with and
12 knowing Ms. Jack, have you formed an opinion as to her
13 truthfulness and veracity?

14 A. Yes, I have.

15 Q. And what is that opinion?

16 A. I believe her to be very truthful, and I believe
17 her veracity to be beyond reproach.

18 MS. PATTON: I'll pass the witness.

19 THE COURT: Cross-examination?

20 MR. HAMPTON: Yes.

21 CROSS-EXAMINATION

22 BY MR. HAMPTON:

23 Q. Who is your wife?

24 A. My wife is Leticia Martinez.

25 Q. Was she the person that testified, to your

1 knowledge, earlier in this hearing?

2 A. I believe so. I really just got off the
3 elevator and came straight to the courtroom.

4 MR. HAMPTON: Okay. Would the State
5 stipulate that that's his wife?

6 MR. BRAGG: Yes.

7 THE COURT: Okay.

8 Q. (BY MR. HAMPTON) Are you familiar with -- I'm
9 going to list some lawyers to you, and I want to see if
10 you're familiar with their reputation or if you have an
11 opinion about their truthfulness and veracity. Larry
12 Moore?

13 A. I do know Larry Moore.

14 Q. Okay. And do you have an opinion?

15 A. I do not.

16 Q. Mark Daniel?

17 A. I do know Mark Daniel.

18 Q. Okay. Do you have any opinion about his?

19 A. I do not express an opinion.

20 Q. Okay. Tim Moore?

21 A. I know Tim Moore.

22 Q. Okay. Do you have any opinion on him?

23 A. I don't.

24 Q. Do you recall a lawyer named Bob Ford?

25 A. I do remember Bob Ford.

1 Q. Okay. Do you have an opinion as to his
2 diligence as an attorney?

3 A. I don't personally. I never had a case with
4 him. I never heard bad things.

5 Q. Okay. But so far as you know, he had a good
6 reputation for diligence as an attorney?

7 A. As far as I know.

8 Q. Okay. Would your opinion -- did you know that
9 Christy Jack during a criminal trial introduced polygraph
10 evidence during an argument?

11 MS. PATTON: Objection, Your Honor. This
12 is going into specific bad acts, and that would not be
13 appropriate at this time.

14 THE COURT: I'm going to sustain the
15 objection at this time.

16 Q. (BY MR. HAMPTON) Did you know that she sought
17 the death penalty over the objection of victims?

18 MS. PATTON: Objection. Again, that's
19 going into specifics, and that would not be appropriate,
20 and the Court has the evidence.

21 THE COURT: All right. I'll sustain at
22 this time.

23 Q. (BY MR. HAMPTON) Would your opinion change if
24 you knew that she made the following argument knowing that
25 the victim's family were opposed to the death penalty? On

1 volume 39, pages 11 and 12 for the record, she argued at
2 the penalty phase in the death penalty trial: So we get
3 to the last question --

4 Before I read that, let me ask you, have
5 you ever handled a death penalty case?

6 A. No, I have not.

7 Q. Okay. On either side, prosecutor or defense?

8 A. No.

9 Q. Well, the last question refers to the mitigation
10 question. And in a death penalty case, the question is,
11 is there any mitigating evidence to render a sentence of
12 less than death.

13 A. Okay.

14 Q. So she says: So we get to the last question,
15 and that is taking into consideration everything, ladies
16 and gentlemen, beginning with the circumstances of this
17 crime, and you know what, his, Mr. Storey's, the
18 defendant's whole family got up here yesterday and pled
19 for you to spare his life. And it should go without
20 saying that all of Jonas' family, the victim, and everyone
21 -- everyone who loved him believe the death penalty is
22 appropriate.

23 Knowing as we've heard here today that
24 Jonas Cherry's parents were adamantly opposed to the death
25 penalty, would your opinion change if you knew this?

1 MS. PATTON: Your Honor, I object. This is
2 assuming facts that have not been conclusively proven and
3 it's not relevant to this witness's testimony.

4 THE COURT: Well, I'll sustain the
5 relevance objection.

6 MR. HAMPTON: I'll pass the witness.

7 THE COURT: Anything else, Ms. Patton?

8 MS. PATTON: No.

9 THE COURT: Is there any objection from
10 either side?

11 MR. BRAGG: No, Your Honor.

12 THE COURT: Thank you, Judge. You may go
13 about your way.

14 THE WITNESS: Thank you. Appreciate your
15 courtesy.

16 THE COURT: Yes, absolutely. Thank you.

17 (Witness leaves courtroom)

18 THE COURT: All right. I think as we
19 discussed we've reached a stopping point for today; is
20 that correct?

21 MR. BRAGG: That is, Your Honor. I have
22 one short matter just to take care -- I should have taken
23 care of at the beginning of the hearing.

24 I would ask the Court to take judicial
25 notice of the Reporter's Record for the trial. That would

1 be the Reporter's Record from Trial Cause Number 1042204D
2 in Criminal District Court No. 3. The clerk's record and
3 other records from the direct appeal process, that being
4 AP Number 76018. And then also all the records that were
5 part of the writ record originally, that being WR Number
6 75828.

7 THE COURT: Well, at this time the Court
8 will take judicial notice of the documents on file in this
9 case, as well as the Reporter's Record that's been
10 referenced.

11 MR. BRAGG: Thank you, Your Honor.

12 THE COURT: All right. Anything else for
13 today?

14 MR. BRAGG: Not today.

15 MR. HAMPTON: Judge, I just want to remind
16 you, because you're going to have time between now and the
17 next setting of the hearing, that I've urged, first of
18 all, the motion to postpone these hearings, which was
19 never ruled upon, so it's moot now, I think.

20 But the other is the nature of that other
21 proceeding, the writ that I filed in the Court of Criminal
22 Appeals, and that's its own thing. But you also have that
23 authority to appoint an attorney pro tem.

24 And I'm not urging a decision today. I'm
25 just reminding you and wanting you to remember the

1 argument of you can -- you can appoint for the limited
2 purposes of clemency a separate attorney pro tem, which
3 frankly would moot out -- I would have to dismiss my writ
4 if you did that.

5 THE COURT: All right. Well, I recall you
6 urging that yesterday, and I'm conscious of it. And I'm
7 sure you will continue to remind me from time to time as
8 appropriate.

9 MR. HAMPTON: Thank you, Judge.

10 THE COURT: We'll have to schedule an
11 additional day for additional witnesses, but that's
12 probably going to be five or six weeks off. I think both
13 sides understand that.

14 MR. BRAGG: We do, Your Honor.

15 MR. HAMPTON: We do.

16 THE COURT: We'll be in contact with y'all
17 as to an appropriate day when everyone can be present to
18 continue and conclude the evidence.

19 MR. WARE: Thank you, Your Honor.

20 THE COURT: Okay.

21 MR. OTTOWAY: Thank you.

22 THE COURT: We'll be in recess at this
23 time.

24 (Proceedings adjourned)

1 STATE OF TEXAS

2 COUNTY OF TARRANT

3 I, Lisa G. Morton, Deputy Official Court Reporter
4 in and for Criminal District Court Number Three of Texas
5 in and for Tarrant County, do hereby certify that the
6 above and foregoing contains a true and correct
7 transcription of all portions of evidence and other
8 proceedings requested in writing by counsel for the
9 parties to be included in this volume of the Reporter's
10 Record in the above-styled and numbered cause, all of
11 which occurred in open court or in chambers and were
12 reported by me.

13 I further certify that this Reporter's Record of
14 the proceedings truly and correctly reflects the exhibits,
15 if any, offered by the respective parties, if requested.

16 I further certify that the total cost for the
17 preparation of this Reporter's Record will be included in
18 the final volume of this record.

19 WITNESS MY OFFICIAL HAND, on this the 15th of
20 November, 2017.

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21
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